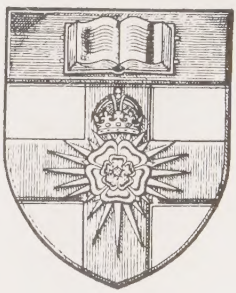
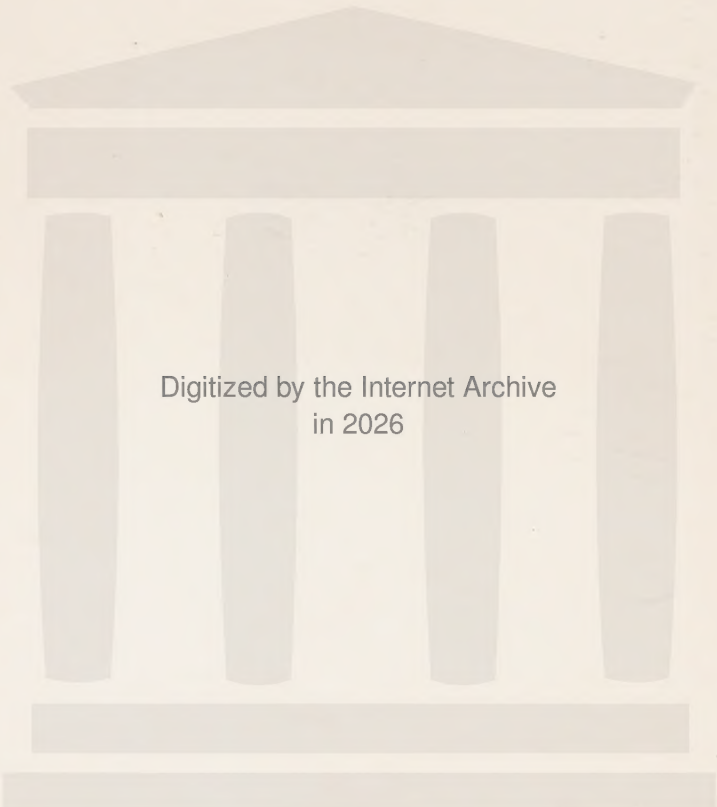
THIS BOOK
MUST NOT BE REMOVED
FROM THE LIBRARY

UNIVERSITY OF LONDON LIBRARY

346 Mx North Gall.



UNIVERSITY OF LONDON
LIBRARY



Digitized by the Internet Archive
in 2026

https://archive.org/details/criminal-appeal-reports_1931-1932_23

THE

CRIMINAL APPEAL REPORTS

WITH

SUBJECT INDEX, TABLES OF CASES AND STATUTES CITED.

MARCH 23, 1931, TO JULY 11, 1932.

EDITED BY

HERMAN COHEN,

OF THE INNER TEMPLE, BARRISTER-AT-LAW,

AND

T. R. FITZWALTER BUTLER,

OF THE INNER TEMPLE AND MIDLAND CIRCUIT, BARRISTER-AT-LAW.

VOL. 23.

LONDON:
SWEET AND MAXWELL, LIMITED,
2 & 3 CHANCERY LANE, W.C.2.

TORONTO:
THE CARSWELL CO., LIMITED.

SYDNEY, MELBOURNE, BRISBANE:
LAW BOOK CO. OF AUSTRALASIA, LIMITED.

1932.

(Printed in England.)

This Volume should be cited as 23 Cr. App. R.

BIBL.
LONDIN.
UNIV.

INDEX OF APPELLANTS' NAMES.

	PAGE
Adams, J.	51
Baldwin, W. G.	62
Betts, H. E.	10
Bookbinder, H.	59
Bray, C.	30
Brown, A.	56
Brown, G. H.	48
Brown, I.	38
Brown, J. H.	18
Bruce, J.	56
Carr, J. E.	176
Carter, H.	101
Casey, A.	193
Chapman, T.	45, 63
Collinson, A. C.	49
Cook, C.	47
Counter, F. J.	22
Cravitz, A.	74
Cresset Trust, Ltd.	10
Curtis, K. M.	158
De Montalk, G. W. V. P.	182
Dunnico, T.	77
Dwyer, T.	156
Eidinow, A. J.	145
Elman, B. L.	66, 105
Greenwood, A. S.	55
Griffiths, G. E.	153
Guerin, E.	39
Hancock, J.	16
Hanslow, L. T.	160
Harding, W.	143
Hart, W. B.	202
Herbert, P.	123
Hillman, I.	53
Holmes, P.	46
Jones, E. C.	208
Jones, F.	69
Jones, R. S.	162
Kendrick, L. W.	1
Kilbride, A. M.	12
King, F. W.	143
Klein, A. J.	173, 185
Kneale, T. S.	73
Kylsant, Lord	83
McGrath, M.	176
Malt, H. W.	45
Martin, A.	52
Medcraft, W. B.	116
Millward, F. T.	119
Moore, W.	138
Morrissey, M.	188
Moss, B.	132
Murray, A.	166
Naylor, R. F.	177
Newbery, F.	66, 105
O'Connell, L. A.	8
Ormesher, E.	172

	PAGE
PHELPS, D.	77
Phillips, J.	127
Pomfret, R.	31
QUINN, J. J.	196, 198
Quint, B. A.	10
RABBITT, C. J.	112
Rankin, W. D.	200
Reynolds, J. P.	173
Roberts, S.	77
Roche, R.	28
Rosen, J.	70
SCHOLES, L.	161
Sharp, E. G.	7
Short, L. W.	170
Simmons, L.	25
Slender, N. W. G.	11
Smith, R.	135
Smith, W. C.	1
Soanes, A.	142
Spellen, H. J.	130
Stewart, A. D.	68, 82
Stewart, F.	61
TAUMAN, L.	44, 125
Thomas, A. H.	21
Thomas, W. L.	36
Thompson, R. D.	76
Tidmarsh, S. G.	79
Tremayne, R.	191
Trowbridge, A.	162
Turner, H. H.	143, 175
VAN DYN, J. P.	150
WALLACE, W. H.	32
Westgate, H. N.	15
Williams, A.	103
Wilson, J.	104
Wright, W.	128
ZEITLIN, L.	163

TABLE OF CASES CITED.

[*The letters* "R. v." *in criminal cases are omitted.*]

PAGE

AARON'S REEFS *v.* Twiss (1896) 86, 89, 98-9

BAKER, W. (1912) 17, 18
Baldwin (1925) 150
Barker, C. R. (1910) 151
Barraclough (1906) ... 182, 184-5
Barron (1914) 2, 4
Brighton Guardians *v.* Strand Union Guardians (1891)... 64
Brown, A. and Bruce, J. (1931) 113
Brown, M. (1906) 195

CARR, W. R. (1916) 133
Case *v.* Storey (1869) 50
Charavanmuttu (1929) ... 143, 174
Charlton (1911) 140
Connell and Irvine (1930) ... 55
Counter (1931) 124
Crisp (1912) 140

DUTT (1912) 134

ELRINGTON (1861) 2

FERGUSON, M. (1913) 133
Fisher, W. (1910) 80
Fitzhugh *v.* Dennington (1704) 65

PAGE

Freedman, S. and W. (1930) 44, 54

GLUCKSTEIN *v.* Barnes (1900) 96
Grimwood (1896) 2

HALES (1924) 194
Harding, Turner and King (1931) 174
Harris, F. (1922) 124
Harry (1928) 124
Hayward, H. (1927) 166
Hicklin (1868) 182, 184-5
Hudson, B. (1912) 146
Humphries (1903) 179
Hunt (1918) 139
Hussey (1924) 17, 18
Hutchinson (1911) 139

IBRAHIM (1914) 157
Income Tax Commissioners (1888) 64
Ingleson (1915) 154

KELLY, T. (1929) 17
King, J. (1897) 2, 4, 5
Kutas (1923) 186-8

LANGRISH *v.* Archer (1882) 50
Leicestershire Justices (1813) 195
Luberg (1926) 107, 109

	PAGE
MARSHALL, K. (1899)	146
Meade (1909)	140
Moran (1909)	179
PEEK *v.* Gurney (1873)	97-8
Pitman, S. (1916)	152
Preston, J. (1909)	146
SCOTT, J. J. (1924)	151
Shurey, *In re* (1918)	65
Sloan and Waddington (1923)	152
Summerskill (1918)	133
TOMEY (1909)	17
Thompson, A. (1918)	81
VOISIN (1918)	157
WHITE *v.* Cubitt (1930)	50
—— and Richardson (1806)	171
Whitehead (1929)	177, 180-1
Williams, H. (1925)	17
Winkel and Others (1912)	57

TABLE OF STATUTES.

PAGE

1851 14 & 15 Vict. c. 100 (Administration of Criminal Justice Act), s. 12 ..... 2—3
1861 24 & 25 Vict. c. 96 (Larceny Act), ss. 82, 83 84
s. 84 ..... 83—100
1871 34 & 35 Vict. c. 112 (Prevention of Crimes Act), ss. 18, 20 ..... 166—170
1872 35 & 36 Vict. c. 94 (Licensing Act), s. 12 ..... 49—50
1879 42 & 43 Vict. c. 49 (Summary Jurisdiction Act), s. 49 65
1889 52 & 53 Vict. c. 63 (Interpretation Act), s. 33 3
1898 61 & 62 Vict. c. 36 (Criminal Evidence Act), s. 1 ..... 188, 190
1902 2 Edw. 7, c. 28 (Licensing Act), s. 8 ..... 49—50
1907 7 Edw. 7, c. 23 (Criminal Appeal Act), s. 4, sub-s. 1 ..... 9, 35
s. 4, sub-s. 3 196
s. 5, sub-s. 2 14
s. 11, sub-s. 2 195
1908 8 Edw. 7 c. 59 (Prevention of Crime Act),
s. 10, sub-s. 2 ..... 166—170
s. 10, sub-s. 4 ..... 123, 168
s. 10, sub-s. 6, s. 17, Sched. ... 166—170
1914 4 & 5 Geo. 5, c. 59 (Bankruptcy Act), s. 154, sub-s. 9 ... 70—71
s. 155 ..... 163—165
1916 6 & 7 Geo. 5, c. 50 (Larceny Act),
s. 29, sub-s. 1, s. 31, sub-s. 2 ... 1—6
s. 33, sub-s. 1 ..... 185—188
s. 43 38
1916 6 & 7 Geo. 5, c. 58 (Registration of Business Names Act), s. 58 ..... 128—9
1922 12 & 13 Geo. 5, c. 56 (Criminal Law Amendment Act), s. 2 ... 63—66
1925 15 & 16 Geo. 5, c. 86 (Criminal Justice Act), s. 40 50
1929 19 & 20 Geo. 5, c. 23 (Companies Act), s. 35 85
s. 356 10
1930 20 & 21 Geo. 5, c. 32 (Poor Prisoners' Defence Act), s. 1, sub-s. 3 ... 79—80
1930 20 & 21 Geo. 5, c. 43 (Road Traffic Act), s. 15, sub-s. 1, s. 121 49

BEFORE

MR. JUSTICE SWIFT, MR. JUSTICE WRIGHT AND MR. JUSTICE HUMPHREYS.

LLEWELLYN WINTHORPE KENDRICK. WILLIAM CORBETT SMITH.

1931. (23 &)24 *Mar.*

6 & 7 *Geo.* 5, *c.* 50, *the Larceny Act*, 1916, *s.* 29, *sub-s.* 1 (*i*), *s.* 31, *sub-s.* 2—*Demanding Money with Menaces—Threatening to Print or Publish—Same Facts—Distinct Offences*—Autrefois Convict.

The offence of uttering " knowing the contents thereof any letter or writing demanding of any person with menaces and without any reasonable or probable cause, any property or valuable thing " (section 29, sub-section 1 (i) of 6 & 7 Geo. 5, c. 50) is not the same as that of " directly or indirectly " threatening " to print or publish or directly or indirectly " proposing " to abstain from or " offering " to prevent the printing or publishing of any matter or thing touching any other person (whether living or dead) " " with intent to extort . . . or to induce " (section 31, sub-section 2 of that Act) : consequently on a trial for either, though the facts in evidence are substantially the same, the plea of *autrefois acquit* or *autrefois convict* in respect of the other is bad.

W. BARRON, 10 Cr. App. R. 81 : 1914, followed.

Appeals against conviction.

Both appellants were convicted at the Central Criminal Court on January 21, 1931, on counts of an indictment which charged them with threatening to publish photographic negatives with intent to extort money, contrary to section 31, sub-section 2 of 6 & 7 Geo. 5, c. 50, the Larceny Act, 1916, and appellant Smith was convicted also on a count charging him with receiving stolen goods. On

1931
(23 &)24 *Mar.*

LLEWELLYN WINTHORPE KENDRICK. WILLIAM CORBETT SMITH.

Swift, J., Wright, J., Humphreys, J.

further counts of the same indictment, charging both appellants with uttering letters demanding money with menaces, contrary to section 29, sub-section 1 (i) of that Act, the jury disagreed. Both appellants were subsequently retried on those counts, and, on February 18, 1931, were convicted. Appellants were then sentenced by the Recorder, Kendrick to two years' imprisonment and five years' penal servitude, concurrent; and Smith to eighteen months' imprisonment and four years' penal servitude, concurrent.

A. H. S. Vivian, for appellant Kendrick (under section 10 of the Criminal Appeal Act, 1907), who was present:

At the second trial pleas of "Autrefois convict" were filed on behalf of both appellants. Issue was joined on those pleas, and the Recorder left the matter to the jury, with a direction that as a matter of law the offence with which appellants were then charged was not the same as those of which they had been previously convicted. The jury found that the pleas were not established, and the trial proceeded. It is submitted that the appellants' plea of "Autrefois convict" ought to have succeeded, as the offence under section 31, sub-section 2 of the Larceny Act, 1916, of which appellant was convicted at the first trial was substantially the same as that under section 29, sub-section 1 (i) with which he was charged at the second tral. The prosecution relied on the same letters and the same evidence as constituting the two offences. [He referred to W. BARRON, 1914, 2 K. B. 570; 83 L. J. K. B. 786; 30 T. L. R. 422; 78 J. P. 311; 58 S. J. 557; 10 Cr. App. R. 81; J. KING, 1897, 1 Q. B. 214; 66 L. J. Q. B. 87; 75 L. T. 392; 18 Cox C. C. 447; 61 J. P. 329; C. C. R.: *conviction for felony q.*; ELRINGTON, 1 B. & S. 688; 31 L. J. M. C. 614; 8 Jur. (N.S.) 97; 5 L. T. 284; 10 W. R. 13; 9 Cox C. C. 86: 1861, Q. B.; GRIMWOOD, 60 J. P. 809: 1896; 14 & 15 Vict. c. 100, the Administration of Criminal Justice

1931.
(23 &)24 *Mar.*

LLEWELLYN WINTHORPE KENDRICK.
WILLIAM CORBETT SMITH.

Swift, J., Wright, J., Humphreys, J.

Act, 1851, s. 12 (*a*); 52 & 53 Vict. c. 63, the Interpretation Act, 1889, s. 33; 2 Hawkins, *Pleas of the Crown*, s. 36.]

Anthony Jessel, for appellant Smith (under section 10 of the Criminal Appeal Act, 1907), who was present:

The plea of "autrefois convict" should have succeeded. The test is, whether the appellant could have been convicted at the first trial of the offence with which he was subsequently charged. In this case he could have been, and that distinguishes the case from that of BARRON (above). [He referred also to *Archbold's Criminal Pleading* (28th ed.), p. 229.] In any event, the judge, in the exercise of his discretion, should not have allowed the second trial to take place.

Sir Percival Clarke (with him *G. G. Raphael*), for the Crown, was not called upon.

SWIFT, J.: It has been argued before us on this appeal that upon the second trial these two men ought to have been acquitted—that the matter should not have been left to the jury on the ground that both had been lawfully convicted of the same offence, or practically the same offence, at the Central Criminal Court in January last. That plea, which was raised before the Recorder and which was left to the jury practically with the direction that they could decide it only in one way, raises a question of law, namely, what it is necessary to prove in order that an accused person may rely on the plea of *autrefois convict*. It is quite clear that, to enable an accused person to rely on that plea, the offence with which he is charged on the second occasion must be the same offence, or practically the same offence, as that with which he was charged on the first occasion. It is not enough to say that the evidence

(*a*) Anyone tried for misdemeanour, if the facts show felony, is not to be acquitted of the misdemeanour, but if a verdict is taken thereon he shall not be prosecuted for felony on the same facts.

1931.
(23 &)24 *Mar.*

LLEWELLYN WINTHORPE KENDRICK. WILLIAM CORBETT SMITH.

Swift, J., Wright, J., Humphreys, J.

tendered on the second charge was the same evidence as that offered to prove the first charge. It is not the evidence which is material to the charge that grounds the plea, but the offence which is charged. That becomes perfectly clear when one considers the judgment of this Court given by Lord Reading, C.J., in W. BARRON, 10 Cr. App. R. 88; he refers to the case of J. KING (above) and says: "The headnote to the report of this case states that 'a defendant who has been convicted upon an indictment charging him with obtaining credit for goods by false pretences cannot be afterwards convicted upon a further indictment charging him with larceny of the same goods,' and Hawkins, J., is reported there as having said: 'It is against the very first principles of the criminal law that a man should be placed twice in jeopardy upon the same facts; the offences are practically the same, though not their legal operation.'" Having made that quotation, Lord Reading, C.J., continued: "It is quite plain that the learned judge did not intend to lay down and did not lay down as a general principle of law that a man cannot be placed twice in jeopardy upon the same facts if the offences are different. The statement obviously refers to a case where the offences are the same, 'practically the same' the words are, and as the two offences in the present case are not either exactly or practically the same it does not help the appellant." Lord Reading then pointed out a difference in the reports of that case, and continued: "It would appear that the decision of the court was given, either because in the exercise of his discretion the judge should not have permitted the trial for larceny, or because the verdict in the first trial was based upon a view of the facts which was inconsistent with that necessary to support the further indictment. At the first trial the conviction implied that the property in the goods passed to the defendant with the consent of the owner, who was induced thereto by false pretences, whereas conviction at the trial for larceny implied

that the defendant feloniously took the goods without the consent of the owner. The substantial identity of the offence was recognised in J. KING as an essential condition to the validity of the plea of *autrefois convict* or *autrefois acquit*, and that case made no change in the general and well-settled principle of law applicable to these pleas. The test is not, in our opinion, whether the facts relied upon are the same in the two trials. The question is whether the appellant has been acquitted of an offence which is the same offence as 'gross indecency,' *i.e.*, whether the acquittal on the charge of sodomy necessarily involves an acquittal on the charge of gross indecency. It is quite clear that the jury could not have convicted the appellant of gross indecency at the first trial. And it is equally clear that the acquittal on the graver charge did not necessarily involve an aquittal of the minor offence." I emphasise the words "The test is not, in our opinion, whether the facts relied upon are the same in the two trials." The question is whether the appellant has been acquitted of an offence which is the same offence as that with which he has been charged.

That being the law, we must look carefully to see whether the charge proceeded with at the trial in February was the same charge, or rather was a charge of the same offence, as the charge of which the jury had found the prisoners guilty at the trial in January. It is not necessary to say more than that the former was framed under section 29 of the Larceny Act, 1916, while the latter was framed under section 31, to show how completely different the offences were. One was a charge of uttering a letter demanding of the prosecutor with menaces and, without any reasonable or probable cause, money. That charge, framed under section 29, is a felony punishable by penal servitude for life. It is impossible to say that that offence is the same, or substantially the same, as the offence charged under section 31, namely, with intent to extort money from

1931.
(23 &) 24 *Mar.*

LLEWELLYN WINTHORPE KENDRICK.
WILLIAM CORBETT SMITH.

Swift, J.,
Wright, J.,
Humphreys, J.

the prosecutor by threatening to print or publish certain matters or things touching him, which is a misdemeanour punishable by two years' imprisonment. It may well be that the evidence before the Court shows that both these offences have been committed, but that does not make them the same offence. The fact that the evidence is the same, or that the facts proved are the same, does not make the two offences identical. They are quite distinct and separate. It may be that the greater includes the less, and that if you prove a case under section 29, you must prove a case under section 31, but I do not decide that this is so.

It seems to this Court that the Recorder adopted a perfectly proper attitude with regard to the pleas of *autrefois convict*, and that he was clearly right in directing the jury as a matter of law that these offences were not the same. The appeals, therefore, fail.

Appeals dismissed.

The sentences were allowed to date from the first conviction.

T. R. F. B.

1931.
24 *March.*

EDWARD GEORGE SHARP.

EDWARD GEORGE SHARP.

Swift, J.,
Wright, J.,
Humphreys, J.

Severity of Sentence.

Appeal against sentence.

Appellant pleaded guilty at Herts Assizes on February 11, 1931, to unlawful carnal knowledge of a girl under sixteen years of age and was sentenced by McCardie, J., to nine months' imprisonment in the second division.

Appellant in person.

No counsel appeared for the Crown.

WRIGHT, J.: The opinion of the Court is that the sentence was excessive. The judge himself pointed out that the girl looked as if she were over sixteen, had some experience of life and apparently was perfectly well capable of looking after herself. The Court does not in any way minimise the seriousness of this offence, which in some cases may be a very wicked and gross one, but the judge has pointed out that the case is one for lenient consideration, and we agree with that view. We think that the period for which the appellant has already been detained —six weeks—is sufficient punishment. We do not say that even that amount of punishment need have been imposed on him originally, but in any event we think that the sentence should be reduced to one of forty-two days. That sentence has now been served, and the appellant will be released forthwith.

Sentence reduced.

T. R. F. B.

1931.
24 *March.*

LAWRENCE ALOYSIUS O'CONNELL.

Swift, J., Wright, J., Humphreys, J.

LAWRENCE ALOYSIUS O'CONNELL.

Close of Prosecution—Evidence of Material Witness Doubtful—Duty of Judge—Sufficiency of Corroboration—Defendant-Witness—Demeanour of those Engaged in the Trial—Verdict not Supported having Regard to the Evidence—"Miscarriage of Justice."

When the Court thinks that at the close of the case for the prosecution the judge, though he cannot hold that there is no case to go to the jury, might well suggest to them that in view of the evidence of the principal witness they could not safely convict and (further) fails to lay sufficient stress on the need of corroboration, it may quash a conviction, as not being supported by the evidence and a miscarriage of justice within section 4, sub-section 1 of the Criminal Appeal Act, 1907.

The Court disapproves of a defendant-witness in the box being treated by anyone engaged in the case in such a way that he cannot give his evidence in his own way.

Appeal against conviction.

Appellant was convicted at the Central Criminal Court on January 26, 1931, of attempted rape and indecent assault, and was sentenced by the learned Commissioner to twelve months' imprisonment with hard labour.

A. S. Comyns Carr, K.C. (*Hector Hughes* with him), for appellant, who was present:

There was no real corroboration of the story of the prosecutrix, which was in itself an extraordinary and incredible one. The summing-up was favourable to appellant, but the question of corroboration should have been dealt with more fully. Further, the way in which the appellant was treated when he went into the witness-box created an atmosphere of hostility against him, which probably was the reason why the jury convicted. [He was stopped.]

E. Fulton, for the Crown, did not seek to support the conviction.

1931.
24 *March.*

LAWRENCE ALOYSIUS O'CONNELL.

Swift, J., Wright, J., Humphreys, J.

HUMPHREYS, J.: It has been argued that there was no corroboration of the evidence of the prosecutrix and that, although corroboration was mentioned in the summing-up, the matter was not dealt with adequately. It is probably not correct in this case to say that there was no corroboration. The main ground of appeal is to be found in the grounds set out by appellant himself: "I am innocent; no charge was ever made against me till I refused to be blackmailed." The summing-up was almost entirely favourable to the appellant, and pointed out time after time that the story told by the prosecutrix was extraordinary and almost impossible for anyone to believe. If a girl tells a story, on which a jury is to be asked to say that she was the victim of an indecent assault, the story must at least be one which is reasonable and which can be accepted as representing the truth about an indecent assault. In our view the judge might well have said at the close of the case for the prosecution: "I cannot say that there is no evidence in this case, but can you possibly convict on the evidence of a girl whose story is so utterly incredible?" In fact, he did not take that course, and the matter was left to the jury. Counsel for the accused then called him as a witness, and from the moment that the accused went into the box he was treated as a person who was being a great nuisance to the jury, to the judge, and even to his own counsel. He was prevented from giving explanations that were by no means immaterial, and there is no doubt that he made an extremely bad witness. The result was that a case, which up to that time seemed as if it could end only in an acquittal, as a result of the accused's unsatisfactory appearance in the box, ended in the jury bringing in a verdict of Guilty.

There are various grounds on which this Court can consider the propriety of upholding a conviction, and they are set out in section 4 of the Criminal Appeal Act, 1907. In our view, this case is one where "the verdict of the jury

1931.
24 *March.*

LAWRENCE ALOYSIUS O'CONNELL.

Swift, J., Wright, J., Humphreys, J.

cannot be supported having regard to the evidence" and if necessary we should also hold that there has been "a miscarriage of justice." The appeal must be allowed and the conviction quashed.

Conviction quashed.

Solicitors for appellant: Edmond O'Connor & Co.

T. R. F. B.

1931.
24 *March.*

HAROLD EDWARD BETTS.
BERNARD ALFRED QUINT.
THE CRESSET TRUST, LTD.

HAROLD EDWARD BETTS. BERNARD ALFRED QUINT. THE CRESSET TRUST, LTD.

Swift, J., Wright, J., Humphreys, J.

Section 356 of 19 & 20 Geo. 5, c. 23, the Companies Act, 1929— Company Offering Shares for Purchase.

Severity of Sentence on defendants of good character.

Appeals against conviction, and applications for leave to appeal against sentence.

Appellants were convicted at the Central Criminal Court on February 12, 1931, of offering shares for purchase, contrary to section 356 of 19 & 20 Geo. 5, c. 23, the Companies Act, 1929. The first two appellants were sentenced by the Commissioner to four months' imprisonment, and the appellant company to a fine of £200.

W. A. Fearnley-Whittingstall, for the appellants.
W. Frampton, for the Crown.

The Court dismissed the appeals against conviction, but allowed the sentences of imprisonment, in view of appellants' previous good character, to be served in the second division and to date from conviction.

Sentences reduced.

Solicitor for appellants: W. Allan Ford.

T. R. F. B.

BEFORE

MR. JUSTICE AVORY, MR. JUSTICE SWIFT AND MR. JUSTICE FINLAY.

NICHOLAS WILLIAM GILBERT SLENDER.

1931.
30 *March.*

Severity of Sentence.

Appeal against conviction and sentence, by leave of the Court.

Appellant, who was present, was convicted at Gloucestershire Quarter Sessions, on January 8, 1931, of breaking and entering a dwelling-house on the night of December 26, 1930, with intent to commit a felony therein and was sentenced by the Deputy Chairman to three years' penal servitude. Another prisoner jointly convicted with him received a sentence of twelve months' imprisonment with hard labour.

Appellant had been previously convicted on several occasions.

H. H. Maddocks, for appellant:

The case for the prosecution rested on the evidence of Mrs. Grey. Her daughter, who left the house a few minutes before appellant entered, was not called. Mrs. Grey swore that she let her daughter out and shut the door after her. Appellant swore that he saw the daughter come out and that she left the door open behind her. At the Police Court appellant said: "I don't want to call witnesses, except I should like to call Mrs. Grey's daughter."

[AVORY, J.: At the trial he was represented by counsel. There was no application for the witness to be summoned.]

The summing-up was unsatisfactory. The sentence was too severe.

R. C. Hutton, for the Crown:

On the day of the trial Mrs. Grey's daughter was ill.

1931.
30 *March.*

NICHOLAS WILLIAM GILBERT SLENDER.

Avory, J., Swift, J., Finlay, J.

AVORY, J.: There was evidence before the jury on which they were justified in finding the accused guilty of breaking and entering with intent to steal. There is no substance in the criticism of the summing-up.

With regard to the sentence, it appears to us that, notwithstanding the bad record of the appellant, a sentence of three years' penal servitude is too severe. That sentence will be reduced to one of twelve months' imprisonment with hard labour, to run from the date of conviction.

Sentence reduced.

H. M. P.

BEFORE

MR. JUSTICE AVORY, MR. JUSTICE SWIFT AND MR. JUSTICE FINLAY.

1931.
31 *March.*

ARTHUR MICHAEL KILBRIDE.

Full Offence—Attempt—Summing Up—" Guilty of Some Other Offence "—Section 5, sub-section 2 of the Criminal Appeal Act, 1907.

On an indictment for an offence, if the evidence warrants it, the summing up should discriminate between that offence and an attempt to commit it.

Appeal against conviction.

Appellant was convicted of incest at Notts Assizes on February 18, 1931, and was sentenced by Talbot, J., to four years' penal servitude.

G. C. Allsebrook, for appellant (under section 10 of the Criminal Appeal Act, 1907), who was not present:

Leave is asked to appeal against sentence also. [This

1931.
31 *March.*

ARTHUR MICHAEL KILBRIDE.

Avory, J.,
Swift, J.,
Finlay, J.

was granted.] The judge should have left to the jury the possibility of finding a verdict of attempted incest, or of indecent assault. Further, the verdict was unreasonable having regard to the evidence. There was evidence of a strong quarrel between appellant and his wife's family in regard to money matters, and the prosecutrix, appellant's daughter, had been forbidden by him to associate with her cousin. This cousin, at the time of the first offence alleged was a girl nearly thirteen years old. That occasion is the only one for which corroboration is suggested and that cousin's the only evidence of it. No charge was made against appellant till long after the commission of any alleged offence nor until after the quarrel about money and the forbidding to associate nor till the prosecutrix had gone to live with her mother's parents. These matters were not referred to in the summing-up. The corroboration of the story of the prosecutrix was very slight, and the medical evidence was strongly in favour of appellant. The story of the girl was that the offence had been repeated several times, but the medical evidence was that the hymen had not been ruptured—that there had been no complete connection.

Geoffrey Smallwood, for the Crown:

The judge brought to the notice of the jury the argument of the defence with regard to the medical evidence, and called it a strong argument. This was essentially a case where the demeanour of the witnesses was more than usually important, and where the Court should hesitate to interfere with the verdict of the jury. If the jury accepted the story of the prosecutrix, the full offence was proved.

AVORY, J.: In view of the medical evidence and of the evidence of the prosecutrix that what was done to her had been repeated on several occasions, the summing-up should have contained a direction to the jury on the difference between the full offence of incest, and an attempt to commit

1931.
31 *March.*

ARTHUR MICHAEL KILBRIDE.

Avory, J.,
Swift, J.,
Finlay, J.

that offence, and on the offence of indecent assault as contrasted with the graver offence. The summing-up, though very careful in many respects, contained no such direction. The omission can well be understood in the circumstances because, as counsel has pointed out, if the prosecutrix was believed in every word she said, it would appear that the full offence had been committed. We think that it was necessary, in the circumstances and in view of the medical evidence, that the judge should have carefully pointed out to the jury the difference between the acts which would constitute the full offence and the acts which would constitute an attempt. We have come to the conclusion that we ought to act under section 5, sub-section 2 of the Criminal Appeal Act, 1907, and substitute for the verdict found by the jury a verdict of guilty of an attempt to commit incest. Having substituted that verdict, we have, of course, to alter the sentence, and we substitute a sentence of two years' imprisonment with hard labour, which will date from conviction.

Verdict substituted and sentence reduced.

T. R. F. B.

The Court (Talbot, Mackinnon and Charles, JJ.) also sat on April 1.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE HUMPHREYS.

HENRY NORMAN WESTGATE.

1931.
20 *April.*

Sentence—One Previous Conviction—No Previous Term of Penal Servitude.

Severity of sentence.

Appeal against sentence, and application for leave to appeal against conviction.

Appellant was convicted at the Central Criminal Court on March 6, 1931, of stealing a cashbox, and further pleaded guilty to stealing a motor car licence. He was sentenced by the Commissioner to five years' penal servitude.

The Hon. E. H. Jessel, for appellant, who was not present:

The application for leave to appeal against conviction is abandoned. Appellant, who is thirty-five years of age, is not a persistent or hardened criminal. There is only one previous conviction against him. In 1925 he was sentenced to fifteen months' imprisonment for receiving, but since his release he has done a substantial amount of honest work.

No counsel appeared for the Crown.

THE LORD CHIEF JUSTICE: It is not necessary to enter into the facts of the case. The appellant is thirty-five years of age, and has only one previous conviction. For a considerable period, apparently, no charge has been made against him. The offence of which he was convicted was, undoubtedly, serious, but we think, in view of all the

1931. 20 *April.*

HENRY NORMAN WESTGATE.

Hewart, L.C.J., Avory, J., Humphreys, J.

circumstances and not least in view of the fact that this is only his second conviction and his first sentence of penal servitude, this sentence of five years' penal servitude may properly be reduced to a sentence of three years' penal servitude, to date from conviction.

Sentence reduced.

Solicitor for appellant: W. R. Perkins.

T. R. F. B.

JOE HANCOCK.

1931. 20 *April.*

JOE HANCOCK.

Hewart, L.C.J., Avory, J., Humphreys, J.

After a defendant has been given into charge of the jury, a verdict must be taken.

On an indictment for rape, prisoner ought to be defended by counsel.

Appeal against conviction and sentence, by leave of the Court.

Appellant was convicted of rape at Derbyshire Assizes on March 2, 1931, and was sentenced by Talbot, J., to three years' penal servitude.

C. E. Loseby, for appellant, who was present:

The conviction was unsatisfactory on several grounds. In the first place, the story told by the prosecutrix was an extremely improbable one, and one which the jury should not have accepted, despite the fact that the appellant apparently admitted the charge in the course of the trial. Secondly, it was unsatisfactory that on a charge of this kind the accused was not represented by counsel.

[THE LORD CHIEF JUSTICE: It is a great pity that in cases of a serious kind a prisoner is not always provided with the assistance of learned counsel.

1931.
20 *April.*

JOE HANCOCK.

Hewart, L.C.J., Avory, J., Humphreys, J.

AVORY, J.: Has not this Court laid down that, in cases of this sort especially, counsel should be instructed on behalf of the accused?

Reference was made to THOMAS KELLY, 21 Cr. App. R. 151: 1929, *c.q.*]

Thirdly, although the appellant was given in charge of the jury, after he had pleaded "Not Guilty," yet, when at a later stage of the proceedings he made statements which apparently amounted to an admission of the truth of the charge, he was sentenced without any verdict of the jury being taken. The record, therefore, was incomplete.

[AVORY, J.: Once a prisoner is in charge of the jury, his statement that he is guilty is merely evidence on which the jury may act.]

E. A. Hawke, for the Crown:

There is no authority which lays it down that there must be a verdict by a jury, where a prisoner withdraws a plea of "Not Guilty" in the course of the trial. In TOMEY, 2 Cr. App. R. 329: 1909, a course similar to that which took place in the present trial was adopted, and no criticism of that procedure was made by the Court of Criminal Appeal. Assuming, however, that the proceedings in the Court below have been a nullity, the Court can order a *venire de novo*. [He referred to H. WILLIAMS, 19 Cr. App. R. 67: 1925; W. BAKER, 7 Cr. App. R. 217: 1912; HUSSEY, 18 Cr. App. R. 121: 1924.]

THE LORD CHIEF JUSTICE: This appellant was charged at Derbyshire Assizes on an indictment which charged him with having carnal knowledge of a woman without her consent. At first, undoubtedly, the appellant pleaded "Not Guilty," but afterwards, in the course of the trial, in somewhat unsatisfactory circumstances, he appears to have made a confession of some sort in the presence and hearing of the jury, and that confession was acted upon, although no verdict of the jury was taken and the jury

1931.
20 *April.*

JOE HANCOCK.

Hewart, L.C.J., Avory, J., Humphreys, J.

was in fact discharged. We have no doubt that, in such circumstances, a verdict of the jury ought to be taken.

In the circumstances, the proper order is an order of the kind made in HUSSEY (above) and W. BAKER (above)—that the conviction of the appellant be set aside, and that he be ordered to appear at the next Derbyshire Assizes there to take his trial. It is obvious that the appellant has been in custody for some time, and if any application is made for bail, it will be considered.

Order in the nature of a venire de novo.

Loseby applied for bail, and appellant was released on entering into his own recognisances for £20 and on undertaking to find within forty-eight hours one surety in £20.

Solicitor for appellant: George Bradley, Chesterfield.

T. R. F. B.

1931.
21 *April.*

JAMES HARVEY BROWN.

JAMES HARVEY BROWN.

Hewart, L.C.J., Avory, J., Humphreys, J.

Conversion — Receiving "for and on account of" — Non-Direction.

On an indictment for fraudulent conversion the jury must be directed on the question whether what was received by defendant was "for and on account of" the person(s) alleged to be defrauded.

Appeal against conviction.

Appellant was convicted of fraudulent conversion at the Central Criminal Court on March 4, 1931, and was sentenced by the Common Serjeant to six months' imprisonment in the second division.

1931.
21 *April.*

JAMES HARVEY BROWN.

Hewart, L.C.J., Avory, J., Humphreys, J.

J. F. Eales, K.C. (*W. Frampton* with him), for appellant, who was present:

The indictment contained fourteen counts; on counts 1 to 4 the jury disagreed. Appellant was convicted on counts 7 and 8 only, and was acquitted on the remaining counts. Count 7 charged him that he, having received a banknote for £1,000 for and on behalf of the International Brick Co., fraudulently converted £250, part of the proceeds, to his own use; and count 8 charged him that he, being a director of the International Brick Co., fraudulently applied £250, part of a banknote for £1,000, the property of the company, for a use or purpose other than the use or purpose of the company. The defence was that the sum of £1,000 had been received by the defendant, not on behalf of the International Brick Co., but on behalf of a Belgian company. That defence was not dealt with in the summing-up, and the question whether the money had been received on behalf of the International Brick Co. or not was never left to the jury. The judge appears to have assumed that the money was received by the appellant on behalf of the International Brick Co., but the evidence showed that it had been received by him on behalf of the Belgian company.

Sir Percival Clarke, for the Crown:

It is true that the jury were not told that they could convict only if they were satisfied that the appellant received the money on behalf of the International Brick Co., but that company was interested in the Belgian company to the extent of 96 per cent. of the shares.

AVORY, J.: It was obviously an essential part of the case for the prosecution to prove that this £1,000 had been received by the appellant for and on account of the International Brick Co., Ltd., or (to satisfy count 8) that it was the property of the International Brick Co., Ltd., and there is no doubt that some confusion arose in the course of the

1931.
21 *April.*

JAMES HARVEY BROWN.

Hewart, L.C.J., Avory, J., Humphreys, J.

case from the fact that apparently at the outset the International Brick Co. was carrying on business as selling agents in this country for the Belgian company, but at a subsequent date the relation was altered and the International Brick Co. came into the position of principals and not agents. It may be that, by reason of that confusion, the Common Serjeant, when he came to sum up, seems to have treated it as of no moment whether the money was received by the appellant on behalf of the International Brick Co. or the Belgian company. So far from directing the jury that in order to find the appellant guilty on either count they must be satisfied that he was acting in the receipt of money as director or on behalf of the International Brick Co., the Common Serjeant appears to have assumed that in either event the only question which the jury had to determine was whether the appellant had fraudulently converted £250 to his own use. There was, undoubtedly, evidence upon which it would have been open to the jury to find that this money had been received by the appellant for and on account of the Belgian company and not the International Brick Co. It is impossible for this Court to say what conclusion the jury would have reached, if the question had been left to them, but as it was not left, and as it was an essential question, if the charges in either of these counts were to be supported, the Court has come to the conclusion that this amounted to a misdirection by way of non-direction, and in view of that non-direction, the verdict cannot stand and the appeal must be allowed and the conviction on these two counts quashed.

Conviction quashed.

Solicitors for appellant: Bateman & Co.

T. R. F. B.

The Court (the Lord Chief Justice, Avory and Humphreys, JJ.) also sat on April 27.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE HUMPHREYS.

ALFRED HENRY THOMAS.

1931.
4 *May.*

Obtaining by False Pretences—Indictment—False Pretence Omitted.

An indictment for obtaining by false pretences that omits the false pretence alleged is bad.

Appeal against conviction and sentence.

Appellant was convicted at Montgomeryshire Sessions on April 2, 1931, and was sentenced by the Chairman to twelve months' imprisonment with hard labour.

George Bankes, for appellant (under section 10 of the Criminal Appeal Act, 1907), who was present:

There was no allegation of any specific false pretence in the indictment, and there were further irregularities in the trial. [He was stopped.]

E. A. Hawke, for the Crown, did not seek to support the conviction.

THE LORD CHIEF JUSTICE: Without going into further matters, it is enough to look at the indictment itself. Nowhere does it say what the false pretences were said to have been. The Crown very properly does not seek to support the conviction, and the appeal is allowed, and the conviction quashed.

Conviction quashed.

T. R. F. B.

1931.
4 *May.*

FREDERICK JAMES COUNTER.

Hewart, L.C.J., Avory, J., Humphreys, J.

FREDERICK JAMES COUNTER.

Habitual Criminal—Misdirection on Attempt to get Work.

If a summing-up ignores evidence of a prisoner's attempt to get honest work it may be quashed.

Appeal against sentence, and application for leave to appeal against conviction.

Appellant was convicted at Middlesex Sessions on April 11, 1931, of burglary and of possessing housebreaking implements by night, and also of being a habitual criminal. He was sentenced by the Chairman to seven years' penal servitude and five years' preventive detention.

S. T. T. James, for appellant, who was present:

There was evidence that appellant had made strenuous attempts to obtain work since his last release, and especially that he had made frequent visits to a Mr. Page, a builder, for that purpose. Yet in the summing-up the jury were told that he had not attempted to work honestly since his last conviction. The sentence for the substantive offence was too severe, as the burglary was not the work of a practised criminal.

No counsel appeared for the Crown.

THE LORD CHIEF JUSTICE (after holding that the sentence of penal servitude, though severe, was not wrong in principle): When one comes to the charge that the appellant was a habitual criminal, other considerations apply. There was, no doubt, evidence on which the jury, if properly directed, might have found this man truly to be a habitual criminal. Evidence was, however, given by a builder named Page of frequent attempts on the part of the prisoner to obtain employment, and although the police repeated what the man himself had said that he had not

1931.
4 *May.*

FREDERICK JAMES COUNTER.

Hewart, L.C.J., Avory, J., Humphreys, J.

in fact done any work, no witness—policeman or other—ever said that he had not tried to get work. Nevertheless, one finds in the summing-up these passages: "If you consider this matter, here is a man who is apparently of the criminal class, with a series of crimes against him, and he must have known a great deal about criminal procedure, and knows perfectly well what is the nature of the evidence against him when a man is charged with being a habitual criminal. . . ." One wonders whence that statement comes, and what there is in support of it. Is it really to be supposed that the Criminal Appeal Reports, neglected by too many persons, are studied by those who may be charged with being habitual criminals? Then on the next page one finds: "If you are of opinion that what the police tell you is correct, namely, that he has not attempted to work honestly and that he has not worked since his last conviction—if you are quite clear about that, of course you will find him guilty of being a habitual criminal." Now no police officer had ever said that, and the evidence of Page, such as it was, was not contradicted. It may well be that, if the matter had been left to the jury in a satisfactory manner, they would have taken the view that the appellant really went to Mr. Page to get a shilling and not to get work, but here is a direct statement that he had not tried to get work.

Finally, at the conclusion of the summing-up one finds this passage: "You have heard the evidence, you have seen the witnesses, and you can judge whether they are men whose evidence you can believe that this man has not tried to turn over a new leaf" No witness appears to have said that; on the contrary, Page said that appellant had come so often to get work as to be "next to a nuisance." It is difficult to speculate on the answer which the jury might have given, if the matter had been laid before them as it should have been, but regard being had to those three passages in the summing-up and to the nature of the

1931.
4 *May.*

FREDERICK JAMES COUNTER.

Hewart, L.C.J., Avory, J., Humphreys, J.

evidence, we feel that, difficult as the case is, and bad as the appellant's character undoubtedly has been, this conviction under the Prevention of Crime Act, 1908, cannot stand. We, therefore, quash the sentence of five years' preventive detention. The sentence of seven years' penal servitude will run from the date of conviction.

Conviction as habitual criminal quashed.

T. R. F. B.

Solicitor for appellant : **F. G. Huggett.**

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY, AND MR. JUSTICE CHARLES.

LOUIS SIMMONS.

1931.
11 *May.*

Sexual Offences — Age of Female — "Reason to Believe" — Corroboration—Direction.

On an indictment for rape and carnal knowledge full and sufficient direction must be given to the jury on the need of corroboration of the story of the prosecutrix, and on the issue of defendant's belief about her age every source from which the jury may infer her age must be referred to, even though each one separately may be open to criticism.

Appeal against conviction and sentence, by leave of the Court.

Appellant was convicted on March 13 at Leeds Assizes of rape, carnal knowledge of a girl under sixteen, and indecent assault, and was sentenced by Macnaghten, J., to five years' penal servitude, and twelve months' imprisonment (concurrent).

Streatfeild, for the appellant, who was present:

The verdict was unreasonable and against the weight of evidence. The judge did not direct the jury fully on the effect of the story of the prosecutrix being uncorroborated. He mentioned the need of corroboration, but suggested three items of corroboration which were not corroboration, namely, the torn dress, to which no attention was drawn by the girl till Mrs. Murphy commented on it, her complaint to Mrs. Murphy, which was not made until Mrs. Murphy asked the cause of the torn dress, and the story told by the girl that the prisoner had called her a "hell-cat," thus

1931.
11 *May.*

LOUIS SIMMONS.

Hewart, L.C.J., Avory, J., Charles, J.

indicating how fiercely she had struggled, were all told by the girl herself to Mrs. Murphy. The jury were asked to treat as corroboration the complaint of the girl. In regard to the question of reasonable belief of age, he had put to the jury only the evidence of the appellant himself about his belief that the prosecutrix was over sixteen, and not that of other witnesses, while he had already discredited the prisoner's evidence to the jury.

Paley Scott, for the Crown:

The fact that in his summing-up the judge had omitted some points should not override the verdict of the jury, who had decided for themselves after seeing and hearing the witnesses. The evidence of some of the other witnesses was open to criticism and had been criticised on the grounds that it would be for their own benefit to state the age of the prosecutrix as over sixteen.

THE LORD CHIEF JUSTICE: The appellant was charged on three counts, rape, carnal knowledge, and indecent assault. As regards rape, counsel has directed the attention of the Court to what was said and what was omitted by the judge. It was established that in December last this girl was fifteen years and two months old and that the appellant was under twenty-three years of age. The evidence showed that between 9.30 and 10 p.m. on December 21 the appellant was driving his car back from Oldham to Leeds. He stopped in Huddersfield in New Street, and there the prosecutrix was walking with a friend. He did not know either of them. The friend gave evidence that the girl went up to the appellant and he had said nothing. Afterwards she was driven in the car some 100 yards past her house, at her request, and it is obvious, if she had been so minded, she might then have left the car. She was then driven on to Netherton and then back to Huddersfield to a place near her own home. At the post office she got out of the car and changed money for the appellant, and she

knew that she was going to be taken to the house of one Mrs. Murphy and there to spend the night.

There is no doubt upon the evidence that during the night, their names having been entered as Mr. and Mrs. Jackson, the appellant had connection with her. He then left the house in his car, promising to return in the morning to fetch the girl. Both Mrs. Murphy and Mr. Hardaker, who were in the house, denied hearing the cries, which she said she uttered at the time of the rape. Two further matters of evidence are (1) on the following morning, as prosecutrix admitted in cross-examination, she would not have told anyone about what had happened, if the appellant had called for her as he said he would, and she would have told her mother that she had stayed the night with her friend; (2) the doctor was quite unable to say that the girl was a virgin before the time of the alleged offence.

The Court is satisfied that the conviction for rape cannot stand, on the grounds that (1) no sufficient direction on the need of corroboration of the story of the prosecutrix herself was given, and (2) because on the weight of evidence as a whole a verdict of rape is unsatisfactory and cannot be supported.

On the question of indecent assault, it was not a fair verdict, as counsel for the Crown admitted, as the jury would not have convicted the appellant of indecent assault unless they had convicted him of rape.

With regard to carnal knowledge of a girl under the age of sixteen, in order to make good the defence set up of "reason to believe," the burden of proof rests upon the appellant. From the summing-up it is apparent that before giving any direction on this subject the learned judge had discounted the evidence of some of the witnesses, and that he did not think it worth while to refer at all to other evidence about age. There were in fact five different sources from which it was possible for the jury to infer a reasonable belief that the prosecutrix in December, 1930,

1931.
11 *May.*

LOUIS SIMMONS.

Hewart, L.C.J., Avory, J., Charles, J.

was of or above the age of sixteen years, (a) the girl herself, (b) her father, (c) Mrs. Murphy, (d) Mr. Hardaker, and (e) the appellant himself. In the summing-up, all the first four sources were entirely ignored. Each might be open to criticism, but this question of belief and reasonable cause to believe was left to the jury solely on the testimony of the appellant himself. This was not satisfactory, and therefore whatever may be the moral aspect, the verdict cannot stand.

Conviction quashed.

Solicitors: J. Wurzal & Co., Leeds, for the appellant; J. C. McGrath, West Riding County Solicitor, for the Crown.

E. B. A.

1931.
12 *May.*

REDMOND ROCHE.

Hewart, L.C.J., Avory, J., Charles, J.

REDMOND ROCHE.

Sentence—Previous Convictions—Long Interval without Conviction.

Severity of sentence.

Appeal against sentence.

Appellant pleaded guilty at Denbighshire Sessions on April 10, 1931, to obtaining money by false pretences and was sentenced by the Chairman to four years' penal servitude.

Appellant, in person, addressed the Court.

No counsel appeared for the Crown.

THE LORD CHIEF JUSTICE: The appellant pleaded guilty to an indictment charging him with having obtained from one Hughes sums of £50 and £1 18s. 6d. by falsely pre-

1931.
12 *May.*

REDMOND ROCHE.

Hewart, L.C.J., Avory, J., Charles, J.

tending that he was then carrying on a genuine business as a moneylender established in 1900 and that as such he was in a position to lend Hughes £1,000. No fewer than thirty other cases, the first of which occurred in October, 1930, the last in January, 1931, were taken into consideration. The total amount of money obtained in those cases, apart from the sums mentioned in the indictment, amounted to £238 odd.

The appellant is fifty-three years of age and has been previously convicted of false pretences. In 1908 he was employed with one Morgan, a moneylender, in Hastings and remained with him till 1912. Afterwards, according to the police officer, the appellant began to run sham moneylending businesses. In 1915 he was sentenced to one month's imprisonment for false pretences, and in July, 1917, to fifteen months' imprisonment with hard labour for conspiracy, other offences being taken into consideration. In 1928 he was certified as insane and was for some months in a mental hospital in Dorset. He then went to Ireland, and sent circulars to a large number of people, especially persons whose names appeared as having judgments registered against them. The Governor of Shrewsbury Prison said that the appellant had been under observation and that he appeared to be quite normal. He asks that the fact that he has not been in trouble for thirteen years should be taken into consideration. The case is a sad and lamentable one. We cannot close our eyes to the fact that thirty other cases were taken into consideration, nor to the fact that, according to expert opinion, he is now at any rate of normal intelligence, but the Court is of opinion that, in all the circumstances, this sentence is excessive, and we think that it ought to be revised, and reduced to a sentence of eighteen months' imprisonment with hard labour, to run from the date of conviction.

Sentence reduced.

T. R. F. B.

1931.
12 *May.*

CHARLES BRAY.

Hewart, L.C.J., Avory, J., Charles, J.

CHARLES BRAY.

Previous Convictions—Nature of Latest Offence.

Severity of sentence.

Appeal against sentence, by leave of the Court.

Appellant pleaded guilty at Hull City Sessions on April 14, 1931, to obtaining money and food by false pretences, and also to obtaining credit by false pretences, and was sentenced by the Chairman to three years' penal servitude.

Appellant in person.

No counsel appeared for the Crown.

THE LORD CHIEF JUSTICE: The appellant is a young man, thirty years of age, but he has been previously convicted no fewer than nineteen times of larceny or of obtaining goods or money by false pretences. His last sentence, one of twelve months' imprisonment, was passed in February, 1930, and he had been released from serving that sentence only a few weeks before he committed the first of the offences now under consideration. It is true that the police officer said that the appellant had worked for farmers—for the last time in 1927—but he added that the appellant was not of strong physique and was not able to do hard work, and he has recently been ill. It is quite true that he has been convicted many times before, but always of comparatively minor offences, and, as we have said in this Court more than once, in determining the sentence regard ought to be had to the intrinsic nature of the offence itself. We have come to the conclusion that, in the circumstances, this sentence of three years' penal servitude is excessive, and we think that it ought to be reduced to a sentence of twelve months' imprisonment with hard labour, to run from the date of conviction. *Sentence reduced.*

T. R. F. B.

RICHARD POMFRET.

1931.
12 *May.*

RICHARD POMFRET.

Hewart, L.C.J., Avory, J., Charles, J.

Previous Convictions—Crime Attributed to Want of Employment.

Severity of sentence.

Appeal against sentence.

Appellant pleaded guilty at Nottinghamshire Sessions on April 10, 1931, to knowingly receiving stolen goods, and was sentenced by the Chairman to five years' penal servitude (to commence at the expiration of a sentence of six months' imprisonment with hard labour, which appellant was then serving).

Appellant in person.

No counsel appeared for the Crown.

THE LORD CHIEF JUSTICE: The appellant has placed before us various written statements and testimonials about his character, including a very striking one from the secretary of the Sheffield Discharged Prisoners' Aid Society, which concludes: "In spite of his past, we shall always be glad to assist Pomfret, because no man ever responded to our efforts quite so loyally as he did, and if he only had regular employment no more would be heard of his criminal exploits." The appellant is thirty-nine years of age and has been previously convicted of larceny and housebreaking on various occasions, in addition to minor offences. His record begins in 1907, and his last conviction for an indictable offence was in April, 1927, when he was sentenced to three years' penal servitude. He was released about July, 1929. The police gave evidence that he had worked at various places, but that he had been out of employment for the last nine months. In all the circumstances, we think that this sentence may properly be reduced, and that

1931.
12 *May.*

RICHARD POMFRET.

Hewart, L.C.J., Avory, J., Charles, J.

the appellant should be sentenced to fifteen months' imprisonment with hard labour, instead of five years' penal servitude. That sentence will commence from April 10, the date of conviction.

Sentence reduced.

T. R. F. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE BRANSON AND MR. JUSTICE HAWKE.

1931.
18 & 19 *May.*

WILLIAM HERBERT WALLACE.

Murder—Suspicion—Evidence Consistent with Innocence and Guilt.

The Court will quash a conviction founded on mere suspicion.

Appeal against conviction.

Appellant was convicted of murder at Liverpool Assizes on April 25, 1931, and was sentenced to death by Wright, J.

Roland Oliver, K.C. (*S. Scholefield Allen* with him), for appellant, who was present:

It is submitted that in this case the prosecution never discharged the onus of proof; in other words, the evidence, viewed as a whole, was as consistent with the innocence of the accused as with his guilt. In a case where the prosecution relies on circumstantial evidence, the evidence must at least be sufficient to exclude the reasonable possibility of someone else having committed the crime. The case here should have been withdrawn from the jury. Appel-

1931.
18 & 19 *May.*

WILLIAM HERBERT WALLACE.

Hewart, L.C.J., Branson, J., Hawke, J.

lant, who was charged with having murdered his wife on January 20, is fifty-two years of age and had been married for eighteen years. The evidence was that he had lived on terms of closest affection with his wife and had no conceivable motive for killing her. The case for the prosecution was that the murder was a planned one, carried out with extreme ferocity and complete callousness. Appellant had been summoned on the evening of the crime on a business matter to a non-existent address by a false telephone message sent to a place where he was known to resort on the day before. The case for the prosecution was that appellant had sent that message himself, as part of a carefully planned scheme to establish an *alibi*, but the evidence was all the other way. The clothing of the murderer must have been heavily splashed with blood, yet no blood was found on the appellant's clothes and he could not have had time to destroy or cleanse them. The theory of the prosecution was that he was wearing only a macintosh at the time of the murder. A partly-burnt macintosh was found under the dead woman's body, and the prosecution contended that appellant alone had a motive for burning it. The defence, however, relied on the fact that her skirt also was burned by contact with a gas fire in the room, and suggested that she had been wearing the macintosh round her shoulders when attacked by an intruder. Appellant made a number of statements after his arrest, and the judge, in his summing-up, observed how consistent they were and how little criticism could be made about them. The case was pressed very hard against the appellant, and the jury were inflamed against him by the oppressive way in which the case was conducted, and help which might reasonably be expected to have been given to the defence by the police was not given. Unfair criticism was made at the trial of appellant's demeanour by witnesses who had said nothing about this at the police court. There was no trustworthy evidence at what hour the deceased woman met

1931.
18 & 19 *May.*

WILLIAM HERBERT WALLACE.

Hewart, L.C.J., Branson, J., Hawke, J.

her death. Throughout the case one fails to find a single piece of evidence that was not consistent with innocence.

[Allusions having been made to the conduct of the Liverpool Police in dealing with the case, the Court declined to go into the matter.]

Hemmerde, K.C., incidentally stated that at the request of the defence the jury was not taken from the City of Liverpool, but from the County of Lancaster.

Oliver, K.C., in reply:

Appellant is accused—this is the whole *gravamen* of the case against him—of having "faked" a situation in which he could pretend that someone other than himself had got let into the house, not had broken into it, and there had murdered his wife.

The Court adjourned for nearly an hour.

T. R. F. B.

THE LORD CHIEF JUSTICE (*a*): This appellant, William Herbert Wallace, was charged, at the Assizes in Liverpool, with the murder of his wife on January 20. In the result he was convicted, and on April 25 last he was sentenced to death. He now appeals against that conviction. Three facts, at any rate, are obvious. The first is that at the conclusion of the case for the Crown no submission was made on behalf of the appellant that there was no case to go to the jury. Counsel has explained the circumstances in which, and the reasons for which, no such submission was made. The fact remains, however, that there was no such submission.

The second fact which seems to be obvious is that the evidence was summed up by the learned judge with complete fairness and accuracy, and it would not have been

(*a*) This judgment is a copy of a *verbatim* transcript supplied by the courtesy of the Director of Public Prosecutions.

1931.
18 & 19 *May.*

WILLIAM HERBERT WALLACE.

Hewart, L.C.J., Branson, J., Hawke, J.

at all surprising if the result had been an acquittal of the prisoner.

The third obvious fact, upon which it is unnecessary for me to dwell, is that the case is eminently one of difficulty and doubt.

Now the whole of the material evidence has been closely and critically examined before us during the past two days by learned and experienced counsel on both sides, and it does not appear to me to be necessary to discuss it again. Suffice it to say that we are not concerned here with suspicion, however grave, or with theories, however ingenious. Section 4 of the Criminal Appeal Act of 1907 provides that the Court of Criminal Appeal shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it cannot be supported having regard to the evidence.

I should like to add that there is not, so far as we can see, any ground for any imputation upon the fairness of the police, but the conclusion at which we have arrived is that the case against the appellant, which we have carefully and anxiously considered and discussed, was not proved with that certainty which is necessary in order to justify a verdict of guilty, and, therefore, that it is our duty to take the course indicated by the section of the statute to which I have referred. The result is that this appeal will be allowed and this conviction quashed.

Conviction quashed.

Solicitors for appellant: Davis, Berthen & Munro, Liverpool.

1931.
20 *May.*

WILLIAM LLEWELLYN THOMAS.

WILLIAM LLEWELLYN THOMAS.

Hewart, L.C.J., Branson, J., Hawke, J.

Obtaining by False Pretences—Evidence Wrongly Rejected—Summing-up Confused—Document Put in at Police Court not Put in at Trial.

Rejection of evidence legally admissible may be ground for quashing a conviction.

The prosecution, *semble*, should put in at the trial all documents put in below.

Appeal against conviction and sentence.

Appellant was convicted of false pretences at the Caermarthenshire Sessions on April 12, and was sentenced by the Chairman to eighteen months' imprisonment with hard labour.

Arthian Davies, for the appellant (under section 10 of the Criminal Appeal Act, 1907), who was present:

The appellant appeals against conviction on the ground of misdirection. The summing-up was misleading in lack of meaning and did not make clear to the jury the issues involved in a case of false pretences. Letters, which were put in at the police court by the prosecution, were not mentioned by the prosecution at the trial, and prisoner's counsel was not allowed to re-examine defendant on them.

Hawke, for the Crown:

The summing-up was not a model but was sufficient on the question whether the representation was made, and, if so, was it with intent to defraud.

THE LORD CHIEF JUSTICE: The appellant was charged at the Caermarthenshire Quarter Sessions on an indictment containing three counts for obtaining money by false pretences, in that he represented that he was authorised by three newspapers, *The Argus*, *The Mercury* and *The Guardian*,

1931.
20 *May.*

WILLIAM LLEWELLYN THOMAS.

Hewart, L.C.J., Branson, J., Hawke, J.

to receive notices for insertion, and received the sums of 1s. 6d., 1s. and 1s. 6d. respectively. He was found guilty on all three counts and was sentenced to eighteen months' imprisonment with hard labour. It is to be observed that he himself gave evidence and claimed that he said that he represented not these papers but *The Spot*, and that he ought not to have marked the receipt "*Argus*," but "*Mercury*," and in fact the advertisement did appear in *The Mercury*.

The case is extremely confused and it is quite clear that the appellant was not connected with these newspapers, nor was anyone called from a journal called *The Spot*. We all feel that the summing-up of the case was unsatisfactory and the difficulties of the case make it important that the summing-up should be clear. Also, there was a letter dated March 3 from *The Spot* office which was put in at the police court, from the appellant addressed to the Editor of *The Mercury* asking him to insert an advertisement, saying that he would call on Thursday with the money, and that he had nothing to do with any other paper but *The Spot*. It was not produced by the prosecution at quarter sessions, and when learned counsel for the defence sought to put questions upon it he was stopped. It is a queer and confused case and we feel that the conviction is unsatisfactory. It has been suggested that there was no miscarriage of justice, but on the materials before us we find it difficult to take that view. We therefore think the appeal should be allowed and conviction quashed.

Conviction quashed.

E. B. A.

BEFORE

1931. 8 *June.*

THE LORD CHIEF JUSTICE, MR. JUSTICE SWIFT AND MR. JUSTICE CHARLES.

ISABELLA BROWN.

Application — Crown not Desirous of being Represented — Sentence mitigated in view of applicant's youth.

Application for leave to appeal against conviction and sentence.

Applicant was convicted at Middlesex Sessions on May 12, 1931, of receiving stolen goods and was sentenced by the Chairman to three years' penal servitude.

Laurence Vine, for appellant, who was not present:

Evidence was given in this case during the trial under section 43 of 6 & 7 Geo. 5, c. 50, the Larceny Act, 1916, of a previous conviction, which is a very unusual procedure, *viz.*, that she had been convicted of fraud or dishonesty within the last five years. The Chairman, in his summing-up, referred to appellant as a person who had some experience of crime, but did not warn the jury not to be unduly influenced by the fact that appellant's previous conviction had been disclosed to them, nor did he refer to corroborative evidence of appellant's evidence which had been given. In view of appellant's age, and the fact that she has been sentenced only to nine months' and three months' imprisonment previously, the sentence was excessive.

No counsel appeared for the Crown.

THE LORD CHIEF JUSTICE: There is no ground for inter-

1931.
8 *June.*

ISABELLA BROWN.

Hewart, L.C.J., Swift, J., Charles, J.

fering with the conviction, but in view of the fact that the appellant is a young woman of twenty-two years of age, and that her previous sentences have been sentences of nine months' and three months' imprisonment, we are of opinion that the sentence requires revision.

We are told that the appellant does not desire to be present, and that the Crown does not wish to be represented, and we think that the justice of the case will be met by reducing the sentence to one of twelve months' imprisonment with hard labour, to date from conviction.

Sentence reduced.

Solicitors for appellant: Ashby & Rogers.

T. R. F. B.

EDWARD GUERIN.

1931.
20 *May.*
8 & 9 *June.*

EDWARD GUERIN.

Hewart, L.C.J., Swift, J., Charles, J.

Evidence in Possession of Crown not Given at the Trial—Previous Conviction of Defendant Disclosed by Defence.

The prosecution ought to disclose at the trial all relevant evidence.

A defendant who gives evidence of his previous conviction cannot set up that that evidence has been wrongly admitted.

Appeal against conviction.

Appellant was convicted on April 21 at the Central Criminal Court for fraudulently converting false cheques and was sentenced by the Common Serjeant to three years' penal servitude.

On May 20 *F. Levy*, for appellant (who was present), asked leave to read an anonymous letter received by the defence, which, if it stated the truth, would exonerate appellant.

1931.
20 *May.*
8 & 9 *June.*

EDWARD GUERIN.

Hewart, L.C.J., Swift, J., Charles, J.

The Court refused to allow the letter to be read, but ultimately read it and granted an adjournment; it declined to order an expert in handwriting to be called.

June 8.—*Frederick Levy*, for the appellant, by the leave of the Court, called a number of witnesses:

Gerald Francis Gurrin, handwriting expert, said that the anonymous letter and the names on the postal order which had been sent with it were written by the same person; that there was a marked difference between appellant's writing and the writing on the cheques which formed the subject-matter of the indictment; and that one of the cheques could definitely be established as being in the same writing as the anonymous letter and the postal order.

James Edward Ellsmore, bootmaker, said that between 6 p.m. and 6.30 p.m., a customer came to his shop in Southampton Row to purchase shoes, and signed a Cook's traveller's cheque for £5. The appearance of that man was entirely different from that of appellant.

Arthur Reginald Wheeler, detective-sergeant, said that nineteen cheques in all had been stolen from the book which contained the two cheques referred to in the indictment, and fifteen had been subsequently negotiated. Five persons in all had been brought to an identification parade, and two of these had picked out appellant as the man who had negotiated cheques. The other persons with whom the remaining cheques had been negotiated gave descriptions of men in no way resembling appellant. In one shop a hat had been left behind, which did not fit appellant.

The evidence of the other witnesses called is summarised in the judgment.

Levy submitted that on this evidence the identification of appellant with the man who had committed the offences charged in the indictment could not be satisfactorily established. He added that there were a number of further points which he desired to raise, if necessary, on behalf of

1931.
20 *May*.
8 & 9 *June*.

EDWARD GUERIN.

Hewart, L.C.J., Swift, J., Charles, J.

the appellant, including a point under section 1 (*f*) of 61 & 62 Vict. c. 36, the Criminal Evidence Act, 1898, which, he believed, had never before been argued.

In answer to the Lord Chief Justice, he said that the reason why he had put appellant's character in issue at the trial was because on the day before the trial a well-known London newspaper had been fined £1,000 for contempt of court arising from the publication of matters concerning appellant, and Edward Guerin's name must have been in the mind of every potential juryman on the day of the trial, as every newspaper in the Kingdom had reported the proceedings for contempt.

The Court decided that the question of identification should be dealt with first.

Sir Percival Clarke, for the Crown:

The theory of the Crown was and is that there were a number of persons who were negotiating the stolen cheques, and that appellant was one of them. Evidence was given that nineteen cheques had been stolen: appellant was charged with uttering two of them. All the cheques were negotiated before appellant was arrested and of this no evidence was given. If the writing on the cheques which were the subject-matter of the indictment was that of the appellant, then the person who wrote the same names on the postal order must have had in his possession materials from which he could copy the writing on the cheques. It was not reasonable to suggest that he could have imitated that writing from memory.

[SWIFT, J.: The case of there being a gang connected with the forgery and uttering of these documents was never before the jury at the Central Criminal Court.]

THE LORD CHIEF JUSTICE [after stating the facts of the case]: We are not asked, any more than the jury at the Central Criminal Court could have been asked, to guess at the truth. The suspicion we entertain may be of the

1931.
20 *May.*
8 & 9 *June.*

EDWARD GUERIN.

Hewart, L.C.J., Swift, J., Charles, J.

gravest kind, but I should like to point out what has taken place. When the appeal came before this Court, as it did on May 20, on the application of counsel for the appellant, who said that a letter and a postal order had been received by the appellant's solicitor, the case was adjourned, and the forged cheques referred to in the indictment and other forged cheques were handed to the solicitors for the prosecution in order that all the documents might be submitted to an expert in handwriting. We have had the advantage of hearing not only evidence with regard to handwriting, but also with regard to the number of stolen cheques which have been negotiated, and the circumstances in which a postal order bearing the names Frank Jackson and James J. Morton was issued at Shaftesbury Avenue post office on May 11 between 1 p.m. and 8 p.m. at a time when the appellant was undoubtedly in custody. As I have said, we are not asked to guess what the truth of this matter is. The question for us is whether in the circumstances and upon the evidence which was given, the appellant was rightly convicted. We are dealing with a crime which was most carefully thought out and was probably the work of various minds and various hands, though no such case was presented to the jury. We do not suppose that we have ascertained the truth or anything like the truth, but in the state of the information before us we have the duty, and the responsible duty, of deciding whether this trial was satisfactory. It is clear that something less than the whole of the story as it was known to the police was placed before the jury. In our opinion, the jury ought to have known that nineteen cheques had been stolen, that fifteen of those cheques had been cashed, and it was only with regard to two of them that any evidence implicating the accused was being offered. More than that, it is difficult to resist the reflection that if the whole story had been before the jury, they might have doubted the identification of the appellant by the two witnesses who professed to identify him.

1931.
20 *May.*
8 & 9 *June.*

EDWARD GUERIN.

Hewart, L.C.J., Swift, J., Charles, J.

We think, further, that this trial was unsatisfactory, because of the facts which were elicited with regard to the bad character of the accused. That disclosure was made in the first instance by the accused's own counsel, and it may well be that he ought not to be allowed to take advantage of that disclosure, but there can be no doubt that the disclosure of those facts must have gravely prejudiced him in the eyes of the jury. His counsel has explained the reasons which actuated him in the course which he took, but nevertheless the result remains. We all think, without expressing anything with regard to the guilt or innocence of this appellant, that we cannot say that if the whole story had been placed before the jury and if the appellant's character had not been divulged, the jury would certainly have convicted. In those circumstances, while we are impressed by the obvious possibilities of this case and while we feel that we do not even now know the truth of the matter, we have come to the conclusion that in the fair administration of the criminal law this conviction cannot stand. The appeal will accordingly be allowed.

Conviction quashed.

Solicitors : Edmond O'Connor & Co., for appellant; Wontner & Sons, for the Crown.

T. R. F. B.

1931.
9 *June.*

LEON TAUMAN.

Hewart, L.C.J., Swift, J., Charles, J.

LEON TAUMAN.

No Evidence to go to the Jury.

Conviction quashed on the ground of there being no evidence of guilt.

Appeal against conviction.

Appellant was convicted at the County of London Sessions on April 23, 1931, of conspiracy to receive stolen property, and was sentenced by the Deputy-Chairman to six months' imprisonment with hard labour.

H. W. Wickham, for the appellant, who was present: There was no evidence of any conspiracy. [He was stopped.]

G. G. Raphael, for the Crown:

The count for conspiracy was added to the indictment because it was thought, in view of the decision in S. AND W. FREEDMAN, 22 Cr. App. Rep. 133: 1930: *c.q.*, where the receiving was not established, on the ground that appellant had not, on arrest, been in possession of the stolen property: yet where, as here, there was evidence of intention to take joint possession, there might be a conspiracy to receive.

THE LORD CHIEF JUSTICE: We are all of opinion that there was no evidence of conspiracy against the appellant. The only evidence against him apparently was that he was present when the police arrived at a shed where part of the stolen property was. We think that this appeal ought to be allowed, and this conviction quashed.

Conviction quashed.

Solicitors: Blanckensee & Co., for appellant; Wontner & Sons, for the Crown.

T. R. F. B.

HERBERT WALTER MALT.

1931.
9 *June.*

HERBERT WALTER MALT.

Hewart, L.C.J., Swift, J., Charles, J.

Severity of Sentence.

Appeal against sentence, by leave of the Court.

Appellant pleaded guilty at Gravesend Sessions on April 30, 1931, to larceny and was sentenced by the Recorder to three years' detention in a Borstal institution.

No counsel appeared. Appellant was present.

THE LORD CHIEF JUSTICE: The appellant is only sixteen years of age and has never been previously convicted. No doubt, the learned and humane Recorder believed that it was for the interest of this boy that he should be sent to Borstal, but we are of opinion that he might be given another chance.

Appellant was bound over in his own recognisance for two years in the sum of £5.

Sentence reduced.

T. R. F. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE FINLAY AND MR. JUSTICE HAWKE.

THOMAS CHAPMAN.

1931.
15 *June.*

Appeal against conviction and application for leave to appeal against sentence.

Appellant was convicted at Huntingdon Assizes on May 19, 1931, of having carnal knowledge of a girl under sixteen years of age, and was sentenced by Avory, J., to six months' imprisonment in the second division.

Oliver Gordon, for appellant (under section 7 of the Criminal Appeal Act, 1907), who was present:

The appellant was twenty-three years and five months

1931.
15 *June.*

THOMAS CHAPMAN.

Hewart, L.C.J., Finlay J., Hawke, J.

at the date of the alleged offence. By section 2 of 12 & 13 Geo. 5, c. 56, the Criminal Law Amendment Act, 1922, the question is whether "a man of twenty-three years of age or under" has "reasonable cause to believe that the girl was over" sixteen.

[HAWKE, J.: When does he cease to be twenty-three?]

The Court thought that the point should be argued before a fuller Bench and meanwhile admitted appellant to bail (£20).

H. W. W. G.

1931.
15 *June.*

PERCY HOLMES.

Hewart, L.C.J., Finlay, J., Hawke, J.

PERCY HOLMES.

Mitigation of sentence for a first offence.

Appeal against conviction and sentence.

Appellant was convicted on April 29 at the Central Criminal Court on two (out of eight) counts of an indictment for fraudulent conversion of cheques and was sentenced by the learned Commissioner to twelve months' imprisonment with hard labour.

Comyns Carr, K.C. (with him *J. Maude*), for the appellant, who was present.

Sir Percival Clarke, for the Crown.

The Court dismissed the appeal but in view of the appellant's previous good character (his age being forty-one years) allowed the term to be served in the second division.

Sentence reduced.

Solicitors for Appellant: Messrs. C. Butcher & Simon Burns.

H. W. W. G.

1931.
15 *June.*

CHARLES COOK.

Hewart, L.C.J., Finlay, J., Hawke, J.

CHARLES COOK.

Sentence mitigated on the ground of youth.

Appeal against sentence by leave of the Court and application for leave to call further evidence.

Appellant was convicted at Middlesex Sessions on May 11, 1931, of breaking and entering a garage and stealing a motor car and was sentenced by the Chairman to three years in a Borstal Institution.

Neither the appellant, who was present, nor the Crown was represented by counsel.

The appellant's father stated his willingness to take charge of his son and the latter agreed to go to him.

THE LORD CHIEF JUSTICE: We have come to the conclusion that it is right to give the appellant another chance because of his youth. He will be bound over in his own recognisance in £10 and his father's in one of £10 to come up for judgment if called upon.

Sentence reduced.

H. W. W. G.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE CHARLES.

1931.
22 *June*.

GEORGE HENRY BROWN.

Severity of Sentence.

Appeal against sentence, by leave of the Court.

Appellant was convicted on May 5, 1931, at the London Sessions of taking a motor car without the owner's consent, and was sentenced to three years' detention in a Borstal institution.

Laurence Vine, for appellant, who was not present:

Appellant is seventeen years of age. The offence was committed in conjunction with an older person. Appellant has one previous conviction, but is given a good character as regards work.

By leave of the Court he called as a witness *Philip Edward Stilton*, chief permanent way inspector, Federated Malay States Railway, who said that he could find temporary work for appellant immediately, and would later be able to procure him permanent work abroad.

THE COURT ordered that appellant, together with his father, should be bound over for two years, a condition of the recognisances being that appellant should place himself under the instructions of Mr. Stilton.

Sentence reduced.

Solicitors for appellant: Ashby & Rogers.

T. R. F. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE CHARLES.

ALFRED CHARLES COLLINSON.

1931.
29 *June.*

Driving Motor Car under Influence of Drink—" Public Place "—Pedestrians only Admitted Gratis.

A field to which the public are admitted is " a public place " within section 15, sub-section 1 of 20 & 21 Geo. 5, c. 43, the Road Traffic Act, 1930.

Appeal against conviction. Appellant was not in custody.

Appellant was convicted at Reading Assizes on May 19 of driving a motor car when under the influence of drink, and was fined £10 by Wright, J., and his licence was suspended for twelve months.

A. Ralph Thomas, for the appellant:

The offence alleged took place on March 24, 1931. Collinson took a party of people in a car which he usually let out for hire to the Garth Point to Point Races at Wokingham. This was held in fields of farmers not usually open to the public. Pedestrians were admitted free and cars at 2s. 6d. per wheel. The field was not " a road or other public place " as used in section 15, sub-section 1 of 20 & 21 Geo. 5, c. 43, the Road Traffic Act, 1930. By section 121, " road " is defined as " any highway or any other road to which the public have access and includes bridges." The first section to deal with this offence was section 12 of 35 & 36 Vict. c. 94, the Licensing Act, 1872.

BIBL. LONDON UNIV.

1931.
29 *June.*

ALFRED CHARLES COLLINSON.

Hewart, L.C.J., Avory, J., Charles, J.

By section 8 of 2 Edw. 7, c. 28, the Licensing Act, 1902, the meaning of "public place" was extended to mean "places to which the public have access." This extension is not applicable to the new offence created by 15 & 16 Geo. 5, c. 86, the Criminal Justice Act, 1925, s. 40, or the section in question. [He referred to CASE *v.* STOREY, L. R. 4 Exch. 319 : 1869 ; LANGRISH *v.* ARCHER, 10 Q. B. D. 44 : 1882 ; and WHITE *v.* CUBITT, L. R., 1930, 1 K. B. 443.]

R. G. Micklethwait, for the Crown, was not called upon.

THE LORD CHIEF JUSTICE : This appellant was charged on indictment at Reading Assizes for that on March 21 at Barton in Berkshire he was under the influence of drink to such an extent as to be incapable of driving his car, contrary to section 15, sub-section 1 of the Road Traffic Act, 1930. In the result he was fined and his licence was suspended for twelve months, and was so endorsed. He now appeals against his conviction.

Counsel has argued for him all that is possible, but admits that on the evidence the jury found he was in the condition charged in the indictment. He urges that the field where the car was being driven was not a public place within the meaning of the Road Traffic Act, 1930. It was ordinarily an open field, but at the point to point race meeting pedestrians entered by the gate and paid nothing, and there is evidence that a crowd of about 2,000 were there. Attention was drawn to various cases and statutes, but cases must be read and statutes must be construed with regard to the evils that they are expected to avert. It was open to the learned judge to decide as a matter of law that this was a public place within the meaning of the section. Instead he left it to the jury and they found it was a public place. Suppose the *ejusdem generis* rule applies, 2,000 pedestrians have just as much right to be protected as if they were upon the public road.

1931.
29 *June.*

ALFRED CHARLES COLLINSON.

Hewart, L.C.J., Avory, J., Charles, J.

The opinion of the Court is that there is nothing in the point argued and the appeal must be dismissed.

Appeal dismissed.

Solicitors: S. C. Stuchbery, for the appellant; H. J. C. Neobard, for the Crown.

E. B. A.

1931.
29 *June.*

JOHN ADAMS.

Hewart, L.C.J., Avory, J., Charles, J.

JOHN ADAMS.

Severity of Sentence.

Appeal against sentence by leave of the Court.

Appellant was convicted at Carlisle Assizes on May 29 of shop breaking and was sentenced by Macnaghten, J., to fifteen months' imprisonment.

Appellant was not present and was not represented.

CHARLES, J.: Appellant pleaded guilty to two counts of shop-breaking, and stealing biscuits and chocolate. He was charged with another man, Burke, who was sentenced to twelve months' imprisonment with hard labour, and Adams fifteen months. Adams has only been convicted once before of house-breaking, and on that occasion the sentence was three months. He appeals against the sentence of fifteen months, and the Court considers that in all circumstances the appeal should be allowed and sentence be reduced to eleven months, to run from date of conviction, so that he will not come out at the same time as Burke—which the Court thinks will be an advantage.

Sentence reduced.

E. B. A.

1931.
29 *June.*

AUBREY MARTIN.

Hewart, L.C.J., Avory, J., Charles, J.

AUBREY MARTIN.

Sentence reduced in view of a period of honest work.

Appeal against sentence, by leave of the Court.

Appellant was convicted at Aylesbury Assizes on May 21 of house-breaking and was sentenced to three years' penal servitude by Branson, J.

Appellant, who was present, was not represented.

AVORY, J.: This appellant pleaded guilty to a charge of breaking and entering three different houses in Beaconsfield and stealing property, and he and Frederick Burrows were each sentenced to three years' penal servitude. In the case of Burrows five other cases were taken into consideration, where Burrows alone was charged. Martin pleaded guilty, therefore the Court cannot inquire into the facts of the case. He says that he was a licensed driver and was hired to drive the other man, but he knew he was not there for any legitimate purpose.

In the matter of sentence there is a difference between him and Burrows, and though there is evidence of previous convictions on four occasions, he was last released on May 24, 1930, and the evidence of the police is that he had in fact earned an honest livelihood since that time by dealing in second-hand cars. In view of the attempt to lead an honest life, the sentence is reduced to eighteen months' imprisonment with hard labour. Leave to appeal having been granted by the Court, sentence will run from the date of conviction.

Sentence reduced.

E. B. A.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE TALBOT.

ISRAEL HILLMAN.

1931.
13 *July.*

Conspiracy—Co-Defendants—Conviction of One Quashed.

As a general rule if the conviction of one of two defendants only for conspiracy is quashed, that of the other will be quashed.

Appeal against conviction.

Appellant was convicted at the County of London Sessions on April 23, 1931, of conspiracy to receive stolen property and was ordered by the Deputy-Chairman to be bound over for two years.

Christmas Humphreys, for appellant, who was not in custody:

Five other men were charged in the same indictment as appellant. Four were convicted of receiving, but appellant and a man named Tauman of conspiracy only. Tauman's conviction was quashed by this Court [p. 44 above]. The evidence was that the six men were found in a small garage, where a number of stolen dresses were hung on a string. They were divided into two heaps, one of which contained twenty-six dresses. A police officer gave evidence that, as he entered the garage, he heard appellant say "twenty-six," but appellant denied this. Tauman had telephoned appellant news of a possible bargain and had invited him to come and look at the dresses. £50 in banknotes was found on the appellant, but his explanation was that he required this for his occupation as a bookmaker. Each of the items of evidence alleged against the appellant can be resolved as being ambiguous, and none is in itself indicative of guilt.

1931.
13 *July.*

ISRAEL HILLMAN.

Hewart, L.C.J., Avory, J., Talbot, J.

There was no evidence of any agreement to do an unlawful act, and the case should have been withdrawn from the jury.

G. G. Raphael, for the Crown:

In cases of this class, it is always difficult to prove that control of the stolen property has been assumed: see S. AND W. FREEDMAN, 22 Cr. App. R. 133: 1930, *c.q.*, and therefore it was thought necessary to add to the indictment a count for conspiracy. There was in this case evidence that appellant at least was party to an agreement to being on the premises for an unlawful purpose. There was no evidence that appellant had been in communication with any of the persons charged with him other than Tauman, whose connection with the matter was obviously that of a subordinate.

THE LORD CHIEF JUSTICE: The appellant and Tauman were convicted only on the count for conspiracy, and on June 8 this Court came to the conclusion that the case against Tauman amounted to no more than suspicion. There was no evidence of any communication between the present appellant and any of the persons indicted with him except Tauman. We think, therefore, that, in view of the fact that Tauman's conviction has been quashed, it follows that the conviction of this appellant also ought to be quashed. It is quite true, and it is a matter, no doubt, for observation, that this appellant did not appeal until he knew that the conviction of Tauman had been quashed, but, on the other hand, it is fair to remember that he had not been sentenced to a term of imprisonment. We have come to the conclusion that in the circumstances we must do here what was done in the case of Tauman, and quash the conviction.

Conviction quashed.

T. R. F. B.

Solicitors for appellant: J. S. Blanckensee & Co.

ARTHUR SAMUEL GREENWOOD.

1931.
13 *July.*

ARTHUR SAMUEL GREENWOOD.

Hewart, L.C.J., Avory, J., Talbot, J.

Borstal Discipline.

Severity of sentence.

Appeal against sentence.

Appellant pleaded guilty at Derbyshire Assizes on June 19, 1931, to officebreaking and larceny, and was sentenced by Branson, J., to three years' detention in a Borstal institution.

Christmas Humphreys, for appellant (under section 10 of the Criminal Appeal Act, 1907), who was present:

Appellant is nineteen years of age and, together with another youth, pleaded guilty to officebreaking and stealing a quantity of stamps. He had only once been convicted before, when a boy of ten. Evidence was given that his home surroundings were very poor, and this seems to have led the judge to think that Borstal detention would be the best thing for him; but it is submitted that there was no evidence " of criminal habits or tendencies " or " association with persons of bad character ": CONNELL AND IRVINE, 22 Cr. App. R. 105: 1930, *s.r.*

No counsel appeared for the Crown.

THE LORD CHIEF JUSTICE: We have come to the conclusion that this is not a case for detention in a Borstal institution. In the opinion of the Court, there was no evidence of " criminal habits or tendencies " or " association with persons of bad character " sufficient to call for that method of treatment. We think that the proper course is that the appellant should be bound over in his own recognisances in the sum of £5 for two years.

Sentence reduced.

T. R. F. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE ACTON.

1931.
20 *July.*

ALFRED BROWN.
JOHN BRUCE.

Suspected Person—Interrogation by Police—Answer Inadmissible in Evidence—No Defence at Police Court—Alibi, etc.—Legal Aid.

The police have no right to suggest by questions to a person detained in custody that they have evidence of his guilt: answers to such a suggestion are not admissible in evidence: WINKEL, 76 J. P. 191; 1912, approved.

When the defence is an *alibi* defendants would do well to disclose it in the Court below.

Such a defence usually warrants legal aid.

Appeals against conviction.

Appellants were convicted at Lincolnshire Assizes on June 12, 1931, of shopbreaking and were each sentenced by Branson, J., to twenty-one months' imprisonment with hard labour.

P. E. Sandlands, for appellants, who were present:

The evidence was that the window of a shop at Spalding was broken on the night of April 20—21. On May 27 a police officer saw the appellants in Spalding, and observed that they halted and looked into the window of this shop. He began to question them, and they were taken to the police station, where each made what purported to be a confession. Their defence at the trial was an *alibi*, and each said that on the particular night he was in Royston casual ward. They subsequently gave particulars of their whereabouts on the nights immediately preceding and following, and said that they were in other casual wards on

1931.
20 *July*.

ALFRED BROWN.
JOHN BRUCE.

Hewart, L.C.J., Avory, J., Acton, J.

those nights. Enquiries have been made, and it appears that their statements are correct.

[He asked for, and obtained, leave to call as witnesses three officials, from Cambridge, Royston and Ware casual wards respectively. Each said that he was unable to identify either of the appellants as having stayed at the particular casual ward, but that it appeared from the records that men of the name of the appellants stayed at Cambridge from April 16—18, which stay the witness believed was prolonged till April 20; at Royston from April 20—21; and at Ware from April 21—23.]

[AVORY, J.: Were not questions put to the appellants by a police officer when they were already in custody?]

The alleged confessions were obtained in that manner, and, therefore, ceased to be voluntary and were inadmissible. In WINKEL AND OTHERS, 76 J. P. 191: 1912, it was pointed out that "to say to a person in custody 'it is alleged so and so' . . . is only a subtle form of cross-examination" by the police, and such evidence, leading to a statement improperly obtained, should not be admitted.

M. D. Van Oss, for the Crown:

The defence of an *alibi* was never suggested, until appellants wrote to the judge immediately before the trial asking for legal aid, which was refused. Even if the confessions should not have been given in evidence, the statements made by the appellants when charged were clearly admissible. These were quite sufficient to entitle the jury, who had heard the defence raised by the appellants, to convict.

THE LORD CHIEF JUSTICE: The case is an unfortunate one in at least three respects. In the first place, the appellants, when they were before the magistrates, did not indicate what their defence was, namely an *alibi*. On the contrary, they stated that they had nothing to say. That leads to the second unfortunate incident, that when the appellants applied for legal aid at the trial the application

1931.
20 *July*.

ALFRED BROWN.
JOHN BRUCE.

Hewart, L.C.J., Avory, J., Acton, J.

was not granted. It is difficult to suppose that if the defence which has been laid before this Court to-day had been at any rate indicated at the police court, there would have been a refusal of legal aid. Thirdly, no doubt in consequence of the absence of legal aid, so-called confessions were admitted in evidence without objection. In the evidence of a police officer one finds this passage: "In the charge room at Spalding police-station I cautioned the accused and said 'I am satisfied you both know something about taking the glass from the window in Ashwell's shop on the night of the 20th April and stealing the goods.' I said: 'Do you care to say what you do know?' They both made a voluntary statement." Those statements so obtained seem to us clearly to come within the mischief described in WINKEL [above]. In the circumstances, without saying more, it seems to us that the trial was unsatisfactory. The appeals must be allowed, and the convictions quashed.

Convictions quashed.

Solicitors for appellants: Danby, Eptons & Griffith, Lincoln.

T. R. F. B.

HYMAN BOOKBINDER.

1931.
20 *July.*

HYMAN BOOKBINDER.

Hewart, L.C.J., Avory, J., Acton, J.

Alleged Accomplice in "Welshing"—Running Away.

There ought not to be a conviction when the evidence is equally consistent with innocence and guilt.

Appeal against conviction and sentence, by leave of the Court.

Appellant was convicted at Derbyshire Assizes on June 20, 1931, of larceny, and was sentenced by Branson, J., to three years' detention in a Borstal institution.

R. W. Frazier, for appellant (under section 10 of the Criminal Appeal Act, 1907), who was present:

Appellant was a bookmaker's clerk, and it was alleged by the prosecution that he was acting in concert with the bookmaker, Daley, who had decamped from a race meeting with a sum of money which he had accepted by way of bets on a horse which won a race. A "tick-tack" man named Ferns was also charged and convicted. There was no evidence that the appellant had stood on the bookmaker's stool in order to try and hide the fact that the bookmaker had decamped, and all the evidence was equally consistent with appellant's innocence as with his guilt. It is true that he ran away, but his explanation was that he did this in order to seek police protection from an angry crowd.

E. A. Hawke, for the Crown:

The jury were entitled to convict. The case depended solely on the proper inference to be drawn from the evidence.

AVORY, J.: The difference between the case of Ferns and the case of the appellant was that, as soon as the bookmaker ran away, Ferns took his place on the stand, in order, no doubt, to keep the crowd quiet for a little

1931.
20 *July.*

HYMAN BOOKBINDER.

Hewart, L.C.J., Avory, J., Acton, J.

time. When Ferns got off the stand, the appellant also ran towards some police officers and obtained protection from them. There was nothing in the evidence to contradict his statement why he ran: "I saw the crowd. If I had stopped there, I should have got kicked to death. I saw the officers there in plain clothes." The judge, in his summing-up, concluded his observations on the case against the appellant in these words, to which no exception can possibly be taken: "It is still a question for you to decide whether when these bets were taken, when he was there helping in booking the bets that Daley was taking, he then knew that Daley meant to run away. If he did not, the fact that Daley ran away afterwards is a matter which makes Daley guilty, but not Bookbinder, so that you have to keep that in mind when you are considering his case." On consideration of the facts of this case, including the statement which the appellant is alleged to have made when arrested: "I have never seen him [Ferns] before. I hope you will be able to square it for me"—an observation clearly capable of an innocent as well as a guilty interpretation—the Court has come to the conclusion that there was no evidence which was not as consistent with the innocence as with the guilt of the appellant. We think that the verdict was unsatisfactory, and cannot be supported having regard to the evidence. The appeal will be allowed and the conviction quashed.

Conviction quashed.

T. R. F. B.

FRANK STEWART.

1931.
20 *July*.

FRANK STEWART.

Hewart, L.C.J., Avory, J., Acton, J.

Sentence to a Term of Borstal Discipline—Several Offences on One Day.

A number of offences committed on the same day are not conclusive of " criminal habits or tendencies " as they might be if they had taken place at some intervals of time.

Appeal against sentence.

Appellant pleaded guilty at Cheshire (Knutsford) Sessions on July 1, 1931, to shopbreaking and larceny and was sentenced by the Chairman to three years' detention in a Borstal institution.

Appellant in person.

No counsel appeared for the Crown.

ACTON, J.: The police evidence was that the appellant had worked well, and had a respectable past, that he lived with very respectable relatives and that his home surroundings were good, that he was in employment at the time when the offences were committed and when he appeared for trial, and that he can be taken back into the same employment, if opportunity is offered.

It is true that, with his assent, three other offences were taken into consideration, but they were all committed on the same day, and therefore, as against a career of respectability and hard work, in which there is no indication of criminal habits or tendencies, there can be set only the misdeeds of this one day. In the opinion of this Court, this is not a case for Borstal detention. The Court think that the justice of the case will be met, if the appellant be bound over in the sum of £5 in his own recognisance for two years.

Sentence reduced.

T. R. F. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE ACTON.

1931.
27 & 28 *July.*

WILLIAM GORDON BALDWIN.

Statement by Defendant — Caution — Trap — Admissibility of Statement—Rights of Defence.

If the judge at the trial is satisfied that defendant was properly cautioned before he made a statement, that statement is admissible in evidence : the defendant is not entitled at that stage to give evidence that the statement was improperly obtained.

Application for leave to appeal against conviction, treated as a final appeal.

Appellant was convicted of murder at Surrey Assizes on July 1, 1931, and was sentenced by Horridge, J., to death.

Alban Gordon, for appellant (under section 10 of the Criminal Appeal Act, 1907), who was present:

The case for the Crown rested largely on a statement alleged to have been made by appellant to P.C. Hodge. At the trial it was desired to object to the statement on the grounds that no caution had been administered, that the statement had been obtained partly by cross-examination, and that the circumstances in which it was taken amounted to a trap. It was desired to call the accused as a witness before the judge to enable him to decide the preliminary issue of the admissibility of the statement, but the judge declined to admit his evidence on this issue. At that stage the judge referred to the matter in the following words: "Your submission comes to this—does it not?—that in every case where a police officer gives evidence that a

prisoner has been properly cautioned, his statement should be excluded by way of anticipation, because the prisoner is going to deny it and set up circumstances which impute its value. Clearly, it is admissible."

Holford Knight, K.C. (with him *A. B. Lucy*), for the Crown were not called on to argue.

1931.
27 & 28 *July.*

WILLIAM GORDON BALDWIN.

Hewart, L.C.J., Avory, J., Acton, J.

THE COURT held that the ruling of Horridge, J., was correct, and dismissed the appeal.

Appeal dismissed.

T. R. F. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE ROCHE, MR. JUSTICE ACTON, MR. JUSTICE HAWKE AND MR. JUSTICE HUMPHREYS.

THOMAS CHAPMAN.

1931.
30 *July.*

Ambiguous Words—Construction—"twenty-three years of age or under."

As in section 2 of 12 & 13 Geo. 5, c. 56, the Criminal Law Amendment Act, 1922, the words "twenty-three years of age or under" may in popular language mean "till the age of twenty-four" the Court leans to a construction favourable to the appellant. Therefore the "valid defence" in that section is open to a man under twenty-four years of age.

Appeal against conviction, and application for leave to appeal against sentence.

Appellant was convicted at Huntingdonshire Assizes on May 19, 1931, of unlawful carnal knowledge of a girl under the age of sixteen years and was sentenced by Avory, J., to six months' imprisonment in the second division.

1931.
30 *July*.

THOMAS CHAPMAN.

Hewart, L.C.J., Roche, J., Acton, J., Hawke, J., Humphreys, J.

The appeal came on for hearing on June 15, 1931, but was reserved for the consideration of a Court of five Judges; appellant, who had been admitted to bail, was present.

Alban Gordon, for appellant (under section 10 of the Criminal Appeal Act, 1907):

The substantial argument on behalf of the appellant arises on the construction of the proviso to section 2 of the Criminal Law Amendment Act, 1922, which enacts "Reasonable cause to believe that a girl was of or above the age of sixteen years shall not be a defence to a charge under section 5 . . . of the Criminal Law Amendment Act, 1885 [48 & 49 Vict. c. 69] . . . Provided that, in case of a man of twenty-three years of age or under the presence of reasonable cause to believe that the girl was over the age of sixteen years shall be a valid defence on the first occasion on which he is charged with an offence under this section." Appellant in this case was aged twenty-three years and five months, and the jury found that he had reasonable cause to believe that the girl was over the age of sixteen years. It is submitted, therefore, that he was entitled to an acquittal. The words of the statute are popular words, and therefore they should be construed in a popular sense: COMMISSIONERS OF INCOME TAX, 22 Q. B. D. 296, 309; 58 L. J. Q. B. 196; 60 L. T. 446; 53 J. P. 198; 37 W. R. 294: 1888, and in popular language a man is of twenty-three years of age until he reaches his twenty-fourth birthday. Further, in this statute the maximum age limit is referred to in two contrasted ways. In section 1 the words "under the age of sixteen" are used, but in the proviso to section 2 the words are "of twenty-three years of age or under." The language being quite different, according to the canons of construction laid down by Lord Esher in BRIGHTON GUARDIANS *v.* STRAND UNION GUARDIANS, 1891, 2 K. B. 156, 167; 60 L. J. M. C. 105; 64 L. T. 722; 55 J. P. 743; 39 W. R. 581, effect should be given to the

1931.
30 *July*.

THOMAS CHAPMAN.

Hewart, L.C.J., Roche, J., Acton, J., Hawke, J., Humphreys, J.

contrast. This proviso refers to two classes of persons—persons of twenty-three years of age, and persons under twenty-three years of age.

[ROCHE, J., referred to *Maxwell on Statutes*, 7th ed., p. 244.]

[He was stopped.]

Linton Thorp, for the Crown:

Time is a technical matter, and therefore the statute should be construed in a technical sense. The argument for the appellant really amounts to an attempt to extend the rule that the law takes no account of a fraction of a day to the fraction of a year: there is no authority for this proposition. The Legislature contemplates three, not two, categories of persons—persons under twenty-three years of age, of twenty-three years of age, and, by inference, persons over twenty-three years of age, who are excluded from the protection of the proviso. If the question were asked *simpliciter* whether the appellant was over twenty-three years of age, the answer would have to be "yes." *Coke on Littleton*, § 104, has "of the age of" as equivalent of "attain the age of." [He referred to the Summary Jurisdiction Act, 1879, s. 49; FITZHUGH *v.* DENNINGTON, 2 Ld. Raym. 1094: 1704, and SHUREY, *In re*; SAVORY *v.* SHUREY, 1918, 1 Ch. 263; 87 L. J. Ch. 245; 118 L. T. 355; 34 T. L. R. 171; 62 Sol. J. 246.]

LORD HEWART, C.J.: The only substantial question in this appeal is whether a man in his twenty-fourth year is a "man of twenty-three years of age or under" within the meaning of the proviso to section 2 of the Criminal Law Amendment Act, 1922. The case for the appellant is that a man becomes twenty-three years of age on his twenty-third birthday and then remains twenty-three until his twenty-fourth birthday. According to the appellant's statement he became twenty-three on September 27, 1929, and the offence was committed on a day in March, 1930.

1931.
30 *July*.

THOMAS CHAPMAN.

Hewart, L.C.J., Roche, J., Acton, J., Hawke, J., Humphreys, J.

Much argument has taken place and may take place on the meaning of the words " in the case of a man of twenty-three years of age or under," but we have come to the conclusion that in this case the observations to be found in *Maxwell on the Interpretation of Statutes*, 7th ed., p. 244, which are based on a series of cases, apply: " Where an equivocal word or ambiguous sentence leaves a reasonable doubt of its meaning which the canons of interpretation fail to solve, the benefit of the doubt should be given to the subject and against the Legislature which has failed to explain itself."

On that ground the Court has decided to allow this appeal and to quash the conviction.

Conviction quashed.

T. R. F. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE ACTON AND MR. JUSTICE HAWKE.

1931.
30 *July*.

FREDERICK NEWBERY.
BURNETT LEON ELMAN.

Long Vacation—Bail—Intricate Case.

Bail granted in view of complexity of the case and of the interval of the Long Vacation.

Applications for bail.

Applicants were jointly convicted at the Central Criminal Court before the Recorder on July 8, 1931, of conspiracy to defraud and obtaining money by false pretences. Newbery was sentenced to two years' imprisonment with hard labour

1931.
30 *July*.

FREDERICK NEWBERY.
BURNETT LEON ELMAN.

Hewart, L.C.J., Acton, J., Hawke, J.

and three years' penal servitude (concurrent), and Elman to twelve months' imprisonment with hard labour.

D. L. Finnemore, for the applicant Newbery, who was not present:

There are special circumstances in this case. The case was one of great length and complexity. The trial lasted thirteen days and there were 681 exhibits, and it appears that the appeal cannot be heard before October. Further, it is very desirable, if the appeal is to be presented properly, that there should be ample opportunity for consultation between applicant and his legal advisers. Before these charges, applicant was a man of good character and substantial sureties are forthcoming.

St. John Hutchinson, for applicant Elman, who was not present:

Reliance is placed on the same general grounds in this case as in the case of Newbery. As applicant has been a solicitor, he would be in a pre-eminently good position to help his legal advisers in preparing his appeal, if bail were granted.

Sir Percival Clarke, for the Crown, did not actually oppose bail, but emphasised the gravity of the offences and the desirability of bail, if granted, being substantial.

THE COURT ordered that the applicants be released, each on his own bail in the sum of £5,000, together with two sureties, in each case, in the sum of £2,500 apiece.

Applications granted.

Solicitors for applicants: Reid Sharman & Co.; Ernest W. Long & Co.

T. R. F. B.

1931.
30 *July*.

ALEXANDER DAVIDSON STEWART.

ALEXANDER DAVIDSON STEWART.

Long Vacation—Bail.

Hewart, L.C.J., Acton, J., Hawke, J.

Bail granted in view of the interval of the Long Vacation.

Application for bail.

Applicant was convicted of forgery at the Central Criminal Court on July 14, 1931, and was sentenced by the Common Serjeant to twelve months' imprisonment in the second division.

R. P. Winfrey, for applicant, who was not present, relied on the complexity of the case, the fact that the jury acquitted applicant of false pretences and fraudulent conversion, the impossibility of the appeal being heard before October and the desirability of applicant having full opportunities of consulting with his legal advisers.

Vernon Gattie, for the Crown, said that he neither acceded to nor opposed the application.

THE COURT ordered that the applicant be released on his own bail in the sum of £100, together with two sureties in the sum of £100 each.

Application granted.

Solicitors for applicant: Wedlake, Letts & Bird.

T. R. F. B.

FRANK JONES.

1931.
30 *July*.

FRANK JONES.

Hewart, L.C.J., Acton, J., Hawke, J.

Sentence—Many Previous Convictions.

Sentence mitigated, despite a very bad "record," in view of the trifling nature of the offence.

Appeal against sentence.

Appellant was convicted at Wiltshire Sessions on July 7, 1931, of officebreaking and larceny, and was sentenced by the Chairman to five years' penal servitude.

Appellant in person.

No counsel appeared for the Crown.

THE LORD CHIEF JUSTICE: The appellant was convicted of breaking into the booking office at a railway station, and stealing a Swiss roll and two pork pies. No doubt, he was sentenced to five years' penal servitude because of his shocking record. Having regard to the magnitude of the offence itself, we think that that sentence may properly be reduced to one of eighteen months' imprisonment with hard labour, to run from the day on which sentence was passed.

Sentence reduced.

T. R. F. B.

BEFORE

MR. JUSTICE SWIFT, MR. JUSTICE CHARLES AND MR. JUSTICE HUMPHREYS.

1931.
18 *August.*

JACK ROSEN.

Misdirection—Language Equally Consistent with Innocence and Guilt—Comment on Evidence for the Defence.

A summing-up must deal carefully with statements by the defendant which are not necessarily admissions though they may be so construed.

Full effect must be given to the evidence of witnesses for the defence.

Appeal against conviction, by leave of the Court.

Appellant was convicted at the Central Criminal Court on July 16, 1931, of being a fraudulent debtor, under section 154, sub-section 9 of 4 & 5 Geo. 5, c. 59, the Bankruptcy Act, 1914, and was sentenced by the Common Sergeant to three months' imprisonment in the second division.

Paul Springman, for appellant, who was present on bail:

The ground for this appeal is that in the summing-up to the jury there was misdirection by the learned Common Serjeant in three particulars, (1) that he told the jury that the accused had been inconsistent in that statement when on the evidence he was shown to have been consistent, (2) that he put the case for the prosecution but not the case for the defence, and (3) that he treated as immaterial the evidence of a witness for the defence that was of great weight, and other evidence for the defence.

[The facts appear sufficiently from the judgment.]

Geoffrey Howard, for the Crown.

1931.
18 *August.*

JACK ROSEN.

Swift, J., Charles, J., Humphreys, J.

SWIFT, J.: The appellant was made bankrupt on February 22, 1930, and in the course of the proceedings he allowed two of his creditors to move certain goods from his premises, on December 9, 1929, and January 2, 1930. When the trustee tried to get the goods back he could not get anything like the amount taken. A dispute having arisen, Rosen produced two receipts dated December 9 and January 2. The two men agreed that these were the receipts they had given and that their signatures were on them, but said that the amounts had been altered by Rosen. Rosen was charged under section 154, sub-section 9 of 4 & 5 Geo. 5, c. 59, the Bankruptcy Act, 1914, with falsifying two receipts given by persons for goods taken from his premises within twelve months before his adjudication as a bankrupt, and was convicted on both counts. He complains of misdirection by the learned Common Serjeant in that he told the jury that what Rosen said when arrested amounted to an admission of some sort of impropriety, that the defence was not put to the jury, and that he told the jury that certain matters of importance to the defence were immaterial.

The question is—who is to be believed in the matter of the receipts, Rosen or the two men? The case required very careful handling and a very careful direction to the jury. When Rosen was arrested and the warrant was read over to him, the last word was "Warszawski" (the name of one of the creditors) and Rosen said "That ought to be reverted to him," *i.e.*, "the charge ought not to be made against me, but against him," and later he said "Why have you not got the other two?" This is consistent with Rosen considering that the charge should not have been made against him but against the two men, but the Common Serjeant appeared to think that it was an admission that he too was guilty. We are satisfied that in this connection there was misdirection.

On another point, to satisfy the court that the receipts

1931.
18 *August.*

JACK ROSEN.

Swift, J.,
Charles, J.,
Humphreys,
J.

were genuine and had not been altered by Rosen, the defence called a solicitor who swore that he had received them the day after each was dated and that they were then in the same condition as they were at the trial. It was vital that this evidence should have been emphasised to the jury, but the learned Common Serjeant said he could not see why the solicitor was called except to bolster up a bad case.

Again, Rosen told of threats made by the two men, and said that they coerced him into letting them take the goods. The Common Serjeant said: "About using bad language and so on, all we have to consider is whether this man altered the receipts." It was of the utmost importance that the jury should have in mind what took place when the goods were removed. If there was coercion they were much more likely to accept Rosen's story that those receipts were given him and that they were not altered. The summing-up did not adequately put the case to the jury and the Court finds that there was misdirection. The appeal is therefore allowed and the sentence quashed.

Conviction quashed.

Solicitor for the defence: Robert A. Kendrick.

E. B. A.

THOMAS STEPHEN KNEALE.

1931.
18 *August.*

THOMAS STEPHEN KNEALE.

Swift, J., Charles, J., Humphreys, J.

Borstal Treatment—Many Previous Convictions.

The Court will not permit youths with very bad records, who are likely to corrupt others, to be sent to Borstal institutions.

Appeal against sentence, by leave of the Court.

Appellant was convicted on July 10, at Wolverhampton Borough Sessions, of shop-breaking, and was sentenced by the Recorder to three years' detention in a Borstal institution.

HUMPHREYS, J.: This young man, seventeen years of age, has been found on six different occasions committing the serious offence of shop-breaking. His record is a terribly bad one—he has thirteen previous convictions. At the age of eight he was sent to an industrial school and later to a reformatory school, from which he absconded several times and was sent back. In December, 1929, he was sentenced to six months' imprisonment, when eighteen cases were taken into consideration, and very soon after his release he was sentenced to nine months' imprisonment when ten cases were taken into consideration against him. The question is whether it is right to send him to Borstal. We think he will do harm at Borstal—he is just the type to corrupt others. The Court agrees with him, though not for the same reasons, that he should not be sent to Borstal. The sentence is quashed and one of twelve months' imprisonment with hard labour is substituted.

Sentence varied.

E. B. A.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE HUMPHREYS.

1931.
12 *October.*

ALEXANDER CRAVITZ.

Application for leave to appeal against conviction (refused by the single judge), and for legal aid.

Applicant was convicted with another man at the County of London Sessions on August 13, 1931, of knowingly receiving stolen goods and was sentenced by the Deputy-Chairman to eighteen months' imprisonment with hard labour.

Application granted.

1931.
19 *October.*

ALEXANDER CRAVITZ.

Hewart, L.C.J., Avory, J., Humphreys, J.

Evidence suggesting a Previous Conviction — "Industrial" School.

Evidence that defendant has been sent to an industrial school is not necessarily evidence of a previous conviction and may be admissible against him.

G. St. J. Macdonald, for appellant (under section 10 of the Criminal Appeal Act, 1907), who was present:

There was no evidence that appellant ever exercised any control over the stolen property. Further, the jury were as good as told that appellant had previously committed a criminal offence. The defence elicited that he did not know his co-prisoner but the latter had given evidence that he and appellant were at school together, and appellant was asked in cross-examination: "Did you not go to the same school, Hayes Industrial School, together?" The reference to a school of that class was a suggestion of a previous conviction.

Beaufoi Moore, for the Crown:

The question of the appellant and his fellow-prisoner

1931.
19 *October.*

ALEXANDER CRAVITZ.

Hewart, L.C.J., Avory, J., Humphreys, J.

having been at school together was first introduced by counsel for the defence. The fact that appellant had been at an industrial school does not necessarily indicate that he had committed a criminal offence; he may have been sent there for other reasons.

THE LORD CHIEF JUSTICE: The real point of the case is that, observation having been made that the appellant and his fellow-prisoner were at school together, the appellant was asked in cross-examination by counsel for the Crown: "Did you not go to the same school, Hayes Industrial School, together." The suggestion has been made that that must have conveyed to the jury that the appellant had been previously convicted of a crime. We do not think that that necessarily follows. A boy may be sent to an industrial school for other reasons, and we have come to the conclusion that there has been no "substantial miscarriage of justice" in this case. There have been several previous convictions, but as leave to appeal was given sentence may run from the date of conviction.

Appeal dismissed.

T. R. F. B.

1931.
19 *October.*

ROBERT DENHAM THOMPSON.

Hewart, L.C.J., Avory, J., Humphreys, J.

ROBERT DENHAM THOMPSON.

Severity of Sentence.

Appeal against sentence.

Appellant was convicted at Essex Sessions on September 9, 1931, of housebreaking, larceny, and possessing housebreaking implements by night and was sentenced by the Chairman to three years' detention in a Borstal institution.

Appellant in person.

No counsel appeared for the Crown.

THE COURT, after hearing the evidence of the appellant's brother, who said that work could be found for the appellant at once, ordered that the appellant be bound over, together with his brother, in the sum of £5 for two years.

Sentence reduced.

T. R. F. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY, AND MR. JUSTICE HUMPHREYS.

DICK PHELPS.
SIDNEY ROBERTS.

1931.
26 *October.*

Severity of Sentence.

Appeals against sentence.

Appellants pleaded guilty to larceny and possessing housebreaking implements by night, at Middlesex Sessions, on July 28, 1931, and were each sentenced by the Chairman to three years' detention in a Borstal institution.

Appellants in person.

No counsel appeared for the Crown.

THE COURT ordered that the appellants be each bound over in the sum of £5 and be placed under the supervision of the Probation Officer.

Sentences reduced.

T. R. F. B.

THOMAS DUNNICO.

1931.
26 *October.*

THOMAS DUNNICO.

Hewart, L.C.J., Avory, J., Humphreys J.

Evidence—Counts Abandoned—Witnesses to "System" alleged in such Counts.

Evidence of "system" by witnesses on abandoned charges only is not admissible.

Appeal against conviction.

Appellant was convicted of obtaining money by false pretences at Lancashire (Preston) Sessions on August 26, 1931, and was sentenced by the Chairman to three years' penal servitude (other offences being taken into consideration).

1931.
26 *October*.

THOMAS DUNNICO.

Hewart, L.C.J., Avory, J., Humphreys, J.

A. Ridehalgh, for appellant (under section 10 of the Criminal Appeal Act, 1907), who was present:

Appellant was convicted, on one of three counts of an indictment, of obtaining a sum of £1 17s. 6d. from a man named Ratcliffe, the false pretence alleged being that he had been sent by one Parsons to interview Ratcliffe about the insertion of an advertisement in an omnibus timetable. A further false pretence alleged in that count that he was carrying on a genuine business, and similar false pretences alleged in two other counts were abandoned by the prosecution. The evidence of four witnesses with regard to the charges that had been abandoned was admitted, and the Chairman, in his summing-up, referred to that evidence as having been admitted "to show a system."

A. D. Gerrard, for the Crown:

The evidence was admissible to show that the mention of the name Parsons by appellant was not inadvertent or accidental.

THE LORD CHIEF JUSTICE: The witnesses were called, apparently, for the purpose of showing that the appellant was not carrying on a genuine business as an advertising agent, and in his summing-up the Chairman unfortunately used these words: "Other witnesses came one after another, and perhaps for the moment you did not realise why they were called. There are no charges in respect of other sums or false pretences or anything like that, but they are simply called to show a system." The witnesses seem really to have been called to give evidence in support of the charges which had been abandoned. We have come to the conclusion that in the circumstances the trial was unsatisfactory, and that this appeal must be allowed and this conviction quashed.

Conviction quashed.

T. R. F. B.

STEPHEN GEORGE TIDMARSH.

1931.
26 *October.*

STEPHEN GEORGE TIDMARSH.

Hewart, L.C.J., Avory, J., Humphreys, J.

Housebreaking—Loitering with Intent to Commit a Felony on a later date—Legal Aid—Poor Prisoners' Defence Act, 1930, 20 & 21 *Geo.* 5, *c.* 32, *s.* 1, *sub-s.* 3 (*b*).

On an indictment for housebreaking on a given date evidence of defendant's movements on a later date is not admissible merely to show that his character was compatible with the crime charged.

In a proper case it is the duty of the Court of trial to offer the accused legal aid.

Appeal against conviction.

Appellant was convicted of housebreaking at Liverpool City Sessions on October 2, 1931, and was sentenced by the Recorder to eighteen months' imprisonment with hard labour.

S. H. Smith, for appellant (under section 10 of the Criminal Appeal Act, 1907), who was present:

The evidence of a police officer in relation to the appellant's movements on August 27, a date subsequent to both the offences charged, was wrongly admitted. It was admitted as purporting to show "system" on the part of appellant, and the Recorder dealt with it as such in his summing-up.

F. Raleigh Batt, for the Crown:

The police officer's evidence can be justified as showing the *technique* used by the appellant in the commission of crimes of housebreaking.

AVORY, J.: The Recorder quite rightly warned the jury that the evidence of the occupants of the houses which had been broken into might not in itself be sufficient to justify them in convicting. In addition to the evidence of those

1931.
26 *October*.

STEPHEN GEORGE TIDMARSH.

Hewart, L.C.J., Avory, J., Humphreys, J.

witnesses, a police officer was called and was permitted to give evidence that on August 27 he arrested the appellant on a charge of loitering with intent to commit a felony, and he was allowed to give evidence of the details of the appellant's movements on that day. It appears that the appellant, not being represented by counsel, applied to the Recorder for legal aid, and the Recorder appears either to have been unaware of or to have forgotten the provisions of the Poor Prisoners' Defence Act, 1930. The former Acts provided that legal aid should be granted only if a defence were disclosed, but this later Act expressly omitted those words. In the opinion of this Court, in view of the evidence of the police officer which had been given before the committing magistrates, this was obviously a case in which legal aid should have been given, and we have no doubt that if counsel had appeared for the accused objection would have been taken to this evidence and that the evidence ought to have been excluded, except on the bare fact, that the appellant had been arrested on August 27. The evidence having been admitted, the Recorder dealt with it thus: "William Culshaw, a police officer, on the morning of August 27, if he is to be believed, saw this man doing precisely what apparently the man was doing on these other days. It becomes evidence because it is evidence of system, showing what he was doing." That conveys to the minds of the jury that on August 27 he was at least contemplating breaking into some house, and the Recorder said "that is evidence of a system"—a system of breaking into other people's houses. This direction to the jury is, in the opinion of the Court, in direct conflict with previous decisions, such as *W. Fisher*, 1910, 1 K. B. 149; 79 L. J. K. B. 187; 102 L. T. 111; 74 J. P. 104; 26 T. L. R. 122; 22 Cox C. C. 276; 3 Cr. App. Rep. 179: *c.q.*, a case in which evidence had been admitted for the purpose of showing system. Channell, J., said in that judgment: "The principle to be observed in such cases is this—Evidence of a prisoner's

1931.
26 *October.*

STEPHEN GEORGE TIDMARSH.

Hewart, L.C.J., Avory, J. Humphreys, J.

bad character is not admissible to prove that he is likely to commit the offence of which he is charged. But to negative mistake or accident, or to prove a systematic course of conduct, other evidence may be admitted where the evidence before the court goes to prove that he did commit the offence with which he is charged."

Again, in *Arthur Thompson*, 1918, A. C. 221; 87 L. J. K. B. 478; 118 L. T. 418; 82 J. P. 145; 34 T. L. R. 204; 62 S. J. 266; 13 Cr. App. Rep. 61, Lord Sumner, in his opinion, said: "No one doubts that it does not tend to prove a man guilty of a particular crime to show that he is the kind of man who would commit a crime, or that he is generally disposed to crime, and even to a particular crime; but sometimes for one reason, sometimes for another, evidence is admissible notwithstanding that its general character is to show that the accused had in him the makings of a criminal, for example, in proving guilty knowledge, or intent or system, or in rebutting an appearance of innocence, which, unexplained, the facts might wear." In the opinion of this Court, this evidence and this direction to the jury tended to show that this was the kind of man who would commit this particular crime of housebreaking. That was a misdirection which vitiates this conviction, and accordingly it must be quashed.

Conviction quashed.

T. R. F. B.

1931.
26 & 27 *Oct.*;
13 & 17 *Nov.*

ALEXANDER DAVIDSON STEWART.

Hewart, L.C.J., Avory, J., Humphreys, J.

ALEXANDER DAVIDSON STEWART.

Appellant on Bail Absconding—Bench Warrant—Estreat of Appellant's and Sureties' Recognisances.

See p. 68 (where for "Common Serjeant" read "the Commissioner").

Appellant, who had been convicted at the Central Criminal Court, on July 14, of forgery and uttering forged documents, and sentenced by the Common Serjeant to twelve months' imprisonment in the second division, had been admitted to bail, in his own recognisances and those of two sureties, pending his appeal against conviction. On October 26 he surrendered to his bail, and at the rising of the Court, his appeal being part heard, was again admitted to bail.

On October 27 appellant failed to surrender to his bail.

THE COURT issued a bench warrant for his apprehension, ordered that all the recognisances be estreated, and adjourned the hearing of the appeal.

On November 4 appellant surrendered, and his appeal was dismissed on November 13 (*V. Gattie*, for the Crown, was not called upon), when *A. Burt* applied that the estreat of the sureties' recognisances should be removed, on the ground that they had each good reason to believe that appellant would surrender in due course. The Court ordered that each should file an affidavit to this effect. On November 17 *Cloutman* read their affidavits to the Court, which thereupon removed the estreats, remarking that becoming bail for an accused was not a mere formality.

Solicitors for appellant: Wedlake, Letts & Birds.

T. R. F. B.

BEFORE

MR. JUSTICE AVORY, MR. JUSTICE BRANSON, AND MR. JUSTICE HUMPHREYS.

LORD KYLSANT.

1931.
2, 3 & 4 *Nov.*

Liability of Director for Prospectus—Section 84 of 24 & 25 Vict. c. 96, the Larceny Act, 1861—Fraudulent Statement by Omission — Misrepresentation with Intent to Deceive or Defraud—Document as a Whole.

On the true construction of section 84 of the Larceny Act, 1861, 24 & 25 Vict. c. 96, a prospectus must be read as a whole and although every fact therein stated is true the document may still be fraudulent within the section if the omission of any other fact is calculated to mislead prospective subscribers.

Appeal against conviction, and application for leave to appeal against sentence.

Appellant was convicted on July 30, at the Central Criminal Court after nine days' trial, of publishing as a director a false prospectus, and was sentenced by Wright, J., to twelve months' imprisonment in the second Division: a co-defendant was acquitted.

Sir John Simon, K.C. (with him *J. E. Singleton, K.C.*, and *Wilfrid Lewis*), for appellant, on bail, who surrendered but was not present:

The indictment contained three counts, each one of which was framed under the same section of the same Act, section 84 of the Larceny Act, 1861 (24 & 25 Vict. c. 96), which remains on the Statute Book although one or two sections immediately following it have now been repealed, and the new Larceny Act takes their place. . . . The question (I think it is the crucial question on the construction of section 84, and on the application of the facts here to that

1931.
2, 3 & 4 *Nov.*

LORD KYLSANT.

Avory, J.,
Branson, J.,
Humphreys, J.

section) is within what limits, and for what purposes, is it material to consider what is omitted when you have a document every single word of which is true? . . . The real test, I apprehend, is—is that which is said to have been omitted (deliberately omitted, possibly) of such a character that if it was added, the words that are used are shown to be false? If that is the true test, there is no justification at all, after the jury have taken the view which they have of the first and second counts of the indictment, for the verdict standing as regards the third count.

Section 84 is: " Whosoever being a Director, Manager, or Public Officer of any Body Corporate or Public Company, shall make, circulate or publish or concur in making, circulating or publishing any written Statement or Account which he shall know to be false in any material Particular with Intent to deceive or defraud any Member, Shareholder or Creditor of such Body Corporate or Public Company or with Intent to induce any person to become a Shareholder or Partner therein, or to intrust or advance any Property to such Body Corporate or Public Company, or to enter into any security for the benefit thereof, shall be guilty of a misdemeanour . . . "

It is convenient to look at section 84 in immediate association with a preceding section or two. If you contrast section 83 (wilfully destroying books) or section 82 (keeping fraudulent accounts) with section 84, the true construction of section 84 emerges quite clearly. In section 82 and in section 83 it is made a penal and criminal offence not only to do something positive, but to do, as it were, something negative, namely, to omit, and the omission *qua* omission, is rendered a crime. In section 84, on the contrary, that which the law is directing attention to is what is positively stated. Economy of information, and a failure to give a more detailed survey is not within the section at all, except in a case in which it can be said that that which is omitted makes that which is stated false. As regards the prospectus,

1931.
2, 3 & 4 *Nov.*

LORD KYLSANT.

Avory, J., Branson, J., Humphreys, J.

the point about it is really this: The prospectus is a prospectus which states the result of working out an average. The average is an average over ten years. The ten figures which are added together for making up that average are all absolutely accurate, and are certified by the auditors as such. They are certified by the very auditor who has been acquitted by the jury at the Central Criminal Court in this case. The document is a document which, on the face of it, informs everybody who reads it: "This shipping company is not having as good a time now as it used to have. It is suffering from depression." Having stated that, the document proceeds to give, absolutely accurately, what the average is.

[AVORY, J.: The average of what?]

An average of the figures for ten years of the balance available for the purposes of meeting the claims which prospective subscribers would have if they took the shares. Does section 84 really mean this—that it puts the penalty of the criminal law *in terrorem* over everybody who issues a prospectus unless in that prospectus he states every fact which might affect the judgment of a shareholder? Even to-day, under the new Companies Act, 1929, no such provision is made in the law. The important section of that Act (19 & 20 Geo. 5, c. 23) is section 35, which provides this: "Every prospectus issued by or on behalf of a company, or by or on behalf of any person who is or has been engaged or interested in the formation of the company, must state the matters specified in Part I of the Fourth Schedule to this Act, and set out the reports specified in Part II of that Schedule." Part I of the Fourth Schedule contains nothing that is material to this point, but Part II, clause 1, makes it necessary to publish "A report by the auditors of the company with respect to the profits of the company in respect of each of the three financial years immediately preceding the issue of the prospectus and with respect to the rates of the dividends, if any, paid by the

1931.
2, 3 & 4 *Nov.*

LORD KYLSANT.

Avory, J., Branson, J., Humphreys, J.

company in respect of each class of shares in the company in respect of each of the said three years." Before that, there was no obligation at all that there should be any statement about the profits of a company; it was not a criminal offence not to state them. The provision according to section 84 of the Larceny Act was that if you did make a statement, it must not be false in a material particular, false to your knowledge. And it is admitted that no statement that we have made is false in a material particular.

Other points dealt with by the learned counsel are sufficiently set forth in the judgment.

The Attorney-General (*Sir William Jowitt, K.C.*: with him *D. N. Pritt, K.C.*, *Eustace Fulton*, and *Patrick Devlin*), for the Crown:

On the authority of *Aaron's Reefs* v. *Twiss*, 1896, A. C. 273; 65 L. J. P. C. 54; 74 L. T. 794, the document, taken as a whole, is a false document, although you may go through it, and you may say with regard to each particular statement, that that statement taken by itself is true. What the document conveys is not merely the facts stated in each sentence, but the inference or the impression which any reasonable person gets from reading those sentences one by one; in other words, by taking it as a whole. Anybody would have said on looking at the document, "This company is a company in which I can safely invest my money."

[AVORY, J.: In what respect do you suggest that this document conveys a false impression, apart from anything which is omitted which you say ought to have been stated?]

The reason why I say that the document is false is this, that having regard to the fact that it is addressed to prospective investors, having regard to the obvious implication which follows therefrom, namely, that prospective investors are having placed before them the relevant facts which will enable them to make up their own minds whether or not they should invest their money in this proposed issue,

this document is stating that there is not only nothing to cause alarm or disquiet, but there is every reason for supposing that the debenture-holders will be quite certain of their security and of a return on their money. This statement was wholly false. There was no reason to suppose that these people would continue to receive the return on their money at all. It is true that had there been a complete change in the situation, had some new cycle intervened, had the existing situation been dispelled, it is possible that all would have gone well, but it is certain that if things went on as they then were the investors would be in great peril.

E. B. A.

AVORY, J. (*a*): The indictment in this case is under section 84 of the Larceny Act of 1861. It charged the appellant in the first two counts with publishing accounts which he knew to be false in material particulars, he being a director of the Royal Mail Steam Packet Company, with intent to deceive shareholders; and in the third count it charged him that he as a director of that company issued a prospectus inviting subscriptions to a debenture issue with intent to induce persons to subscribe or advance money to the company.

Before the appellant pleaded, an application was made by learned counsel (Sir John Simon), on his behalf, that further particulars should be given by the prosecution of the matters alleged to be false in the several documents. The learned judge adjourned his decision on that application till he had heard the opening of the case for the prosecution.

The case having been opened by the learned Attorney-General for the prosecution, at the close of that opening the learned counsel (Sir John Simon) said: "With regard to the request I made earlier in the day, I have been following

(*a*) This judgment is printed from a *verbatim* transcript supplied by the courtesy of the Director of Public Prosecutions.

1931.
2, 3 & 4 *Nov.*

LORD KYLSANT.

Avory, J., Branson, J., Humphreys, J.

closely what the Attorney-General has said, and I have his assurance that what he proposes to submit at the end, after the evidence is called, is what he has opened here. I think it is only reasonable to say that that gives me the particulars I am entitled to, and I do not wish to put the Crown to any further trouble."

In order to appreciate the effect of that concession, it is just necessary to look at one or two passages in the opening of the learned Attorney-General, where he said: "Now, members of the jury, let me make this observation to you about that document"—referring to the prospectus —"I am not for a moment going to consider detailed words and phrases. Think of the type of person to whom this was addressed. It was addressed to the prospective investor, and presumably the prospective investor of a more or less cautious type. This is not anything like a gamble. This is almost gilt-edged stock, debenture issue of the Royal Mail. Consider that you are addressing to him. See how this document strikes him and must have been intended to strike him. What is the relevance of setting out the past at all? Why say what you were doing in the past? Why say that you have been earning—and saying it in leaded type—more than £500,000 a year, unless it be that you obviously mean anybody to draw this conclusion: 'From what has taken place in the past, you may legitimately draw an inference what will take place in the future.' It is quite obvious to every one of us that that is the object. Now could you possibly, on the facts of this case, as you know them, draw any inference as regards the future, from the fact that during these years these sums of money had been expended in dividend? That is the simple point. If this company has been throughout these years with all the figures and all the relevant facts that I have opened to you, expending millions, five to six million pounds and each year a deficit, is it not utterly dishonest—and I do not mince my words—utterly dishonest, to put a document

before a prospective investor and say to him, ' Now this is what we have done in the past,' and imply to him, ' What we have done in the past is a fair indication of what you may reasonably expect we shall do in the future ' ? "—and following on that observation the learned Attorney-General quoted from the opinion of the late Lord Halsbury in the case of *Aaron's Reefs* v. *Twiss*, reported in 1896 Appeal Cases, to which we shall have occasion to refer later.

So bearing in mind those passages of the opening, and the concession which was made by the learned counsel that that supplied him with sufficient particulars of this indictment, the issue before the jury was defined, and the trial on that issue proceeded. We are not saying, of course, for a moment, that that concession about particulars in any way precluded the learned counsel from his further argument on the proper construction of section 84 of the Larceny Act.

In the result, the appellant was acquitted on counts 1 and 2, and he was convicted upon count 3. In case it should be thought that there is any apparent inconsistency in the verdict of the jury, we think it right to say that with regard to counts 1 and 2 the jury may have thought that existing shareholders had some information from the published accounts which the outside public had not, particularly in view of the fact that in the Profit and Loss Accounts for those years and previous years there had been some indication of what was called an " adjustment of taxation reserves," a somewhat abstruse expression which gave rise to considerable discussion during this case.

Now coming to count 3, on which the appellant was convicted, the prospectus in question was issued on June 29, 1928. The subscription list was opened on July 3 and closed on or before July 4. It was an issue of 5 per cent. debentures at £92 10s., and in fact it was oversubscribed.

The material portions of that prospectus are first of all the statement of the capital issued and fully paid, of the existing Debenture Stock, and of the Reserve Fund of

1931.
2, 3 & 4 *Nov.*

LORD KYLSANT.

AVORY, J., BRANSON, J., HUMPHREYS, J.

£1,450,000, and the Insurance Fund of £1,311,755; and on page 2 of the prospectus, after setting out the history of the company and stating that the object of the issue was to provide additional capital for a new freehold building and for the general purposes of the company, it proceeded: "The interest on the present issue of Debenture Stock will amount to £100,000 per annum. Although this company, in common with other shipping companies, has suffered from the depression in the shipping industry, the audited accounts of the company show that during the past ten years the average annual balance available (including profits of the Insurance Fund), after providing for depreciation and interest on existing Debenture Stocks, has been sufficient to pay the interest on the present issue more than five times over. After providing for all taxation, depreciation of the fleet, etc., adding to the reserves and payment of dividends on the Preference Stocks, the dividends on the Ordinary Stock during the last seventeen years nave been as follows: "—and then it sets out a table of the dividends paid from the year 1911 to the year 1927 inclusive, those dividends varying from 5 up to 8 per cent., and down on one occasion in the year 1926 to 4 per cent., in 1927 again showing 5 per cent.

One purpose for which this issue was made appears to have been to pay off an overdraft at the bank of £500,000, which had been agreed with the bank in the year 1926. That overdraft, granted in 1926 for a period of three or six months, had been renewed from time to time for short periods on the promise of this new issue being made, out of which the bank hoped to be paid the overdraft.

We now come to consider the grounds of appeal in this case, which are: (1) That there was no evidence that the appellant made or published or concurred in making or publishing a written statement which was false in any material particular; (2) that there was no evidence that he made or published that prospectus knowing it to be false

in any material particular; and (3) no evidence that he made or published that prospectus, which he knew to be false in a material particular, with intent to induce persons to entrust or advance property to the Royal Mail Steam Packet Company. The third ground is immaterial, because it is now admitted that if it was published, and if it was false, and known to be false, there can be no question that it was published with intent to induce persons to entrust or advance property to the company.

These grounds of appeal were supplemented by the further ground that the learned judge at the trial had misdirected the jury, and that he ought to have directed them that there was no evidence that the prospectus contained any false statement; and it then sets out certain extracts from the summing-up of the learned judge, which, it is complained, were in fact wrong, amounting to a wrong direction in law. These are long extracts, and they are, as I have said, only extracts. It will be necessary to refer to some other passages in the summing-up to which exception is not specifically taken.

These are the passages which are complained of, in which the learned judge said, referring to the section: "These are the words which it is said require some consideration, and I confess I think they do. It is these words, 'make, circulate, publish or concur in making, circulating or publishing any written statement or account which he shall know to be false in any material particular.' What exactly does that mean? The conclusion that I have arrived at is this, that it is not limited to a case where you point to a written account or written statement and say: Here are certain figures, here are certain words which are false. I think that is to narrow unduly the words 'in any material particular.' It is perfectly true that in a criminal act, which carries with it the penalties of the criminal law, the Act must be strictly construed, but it must be reasonably construed, and in my judgment to construe it in that way

LORD KYLSANT.

Avory, J., Branson, J., Humphreys, J.

would be to shut out a type of fraud in connection with written documents or written accounts which may be of the utmost importance, and that is the type of fraud which may be found in a document, not fraudulent in the sense of what it states, but in the sense of what it conceals or omits. You may have a definite and positive falsehood in a document, and then when that obviously is the case, where in respect of the words pertaining to that specific falsehood you could say, ' This is a material particular '—it is for the judge to say what is material, but clearly I am taking a case, as indeed in this case, where what is alleged is definitely material. It may be said where you have specific words or figures containing a falsehood which you can put your finger on and say ' it is false in a material particular, and it is in this material particular,' but I think the language which is used means more than that, according to its reasonable interpretation. It will cover the case where you have a written statement which is false, not in any specific words or any specific figures which it contains, but which is false in the way in which a document may be fraudulent, namely, where you may take every word and every figure and say, ' Now there is nothing false about this, there is nothing false about that,' but the document as a whole may be false—the document as a whole may be false not because of what it states, but because of what it does not state, because of what it implies. Of course, that type of falsity, which is indeed the type of falsity in the main in question here, is more difficult to establish than the case where you can point to a specific false word in a sentence, because where the falsity consists in a fraudulent desire to create a false impression, while keeping accurately to the limited facts which appear in the document, where the falsity consists of that, you have to show affirmatively that there was a deliberate intent to create a false impression. If you have a definite falsehood, that speaks for itself. A man who has told a definite falsehood or written

a definite falsehood may perfectly well be able to show that though it was false he did not know that it was false, or in certain cases, that he knew it was false, he did not intend to deceive anybody, but made a false statement, an inaccurate statement thinking that it was substantially true, though he knew all the facts which ought to have told him that it was untrue. That is a much simpler case than where you have a case in which a written statement is alleged to have been false in the sense that it was concealing true facts. Then you have to show before you can get any further at all that it was a deliberately concocted instrument, the instrument of a definite scheme to defraud or to deceive, as the case may be, and therefore in order to prove a case of fraud of this latter type, fraud as it were by concealment, the intent of the parties must be established at the outset. But to construe section 84 so as to exclude from its ambit that type of fraud in a written statement of account is, in my judgment, to limit unduly the scope of the enactment, to exclude from it some of the most important types of false documents which in this class of case may have to be dealt with and—which, I think, is the guiding feature—to do an injury to the language; the language must be construed reasonably, according to its natural meaning, and in my view, having regard to the whole of this section, its purpose and its character, I think the construction which I have given to it is the true construction."

Then there follows another long extract from the summing-up of the learned judge, which it is not necessary to read in full, but which contains this passage, and it is a part of the summing-up which is complained of as being wrong in law, amounting to a wrong direction, in which the learned judge said: "Was the form which was adopted here, and which erred by reticence, deliberately adopted with an intention to deceive? Was it, not merely a case of prudent and well-advised reticence, but a case of malignant, deliberate, wicked and treacherous deceit in order to

1931.
2, 3 & 4 *Nov.*

LORD KYLSANT.

AVORY, J., BRANSON, J., HUMPHREYS, J.

defraud? This is one of those difficult cases, but not impossible cases, which have occurred from time to time in the course of company transactions, where a document has been put forward in order to be acted upon (prospectuses and other things) and put forward in such a form that though it stated every fact correctly fact by fact, everything was correctly stated by the card, and yet the true effect of what was said was completely false and completely misleading. Now that result might be achieved with the best of intentions, and by a man who, while his mind was fixed on attaining his object, and floating an issue, and while he was in a sense thinking of what was best to achieve that object, was not thinking and was not conscious to himself that he was going to mislead people and that he was going to induce them to subscribe to the issue under a belief which was completely false and completely delusive. People sometimes say to themselves, 'Well, this is all I need tell; I will only tell as little as it is necessary, but what I will tell I will tell quite accurately, and then I can quite fairly and honestly leave it to the person who reads this prospectus to make up his own mind.' That is to say, he may have no dishonest intent, he may have perhaps no real consciousness that what he is doing is delusive and mischievous. He may, of course, be, in some cases, if he is under a legal obligation to disclose all the relative facts, liable to a civil action. Here you are not concerned with the civil liability, you are concerned with the offence under this Act as stated in the indictment."

Then he reads again the charge in the indictment, and he proceeds: "Of course that means that he fraudulently and with wicked intent and deliberately published that with that wicked design of defrauding. Now that, again, is a question entirely for you. Do you think that this was a document which by accident or design innocently or criminally did mislead people? Do you think that people invested on the faith of this document, and in the belief

that it contained all that it ought to contain, whereas if they had been told the true facts they would not have put money into this concern at all, because they would have wanted some guarantee of the earning capacity of the company? "

That passage that I have just read is followed by a further passage, in which the learned judge said: " As we all know, though a debenture-holder in a sense is secured, indeed, in fact is secured on the assets which, in certain events, he may realise, which he may enter into possession of in certain events, yet the man who takes debentures is not thinking of that; he wants to take a debenture which is secure as regards the assets and which is also likely to be a useful debenture to him and yield him an income year by year, an income which will come in due course from the earnings of the company, and therefore it seems common-sense that a man would not invest in a company at a time when it had a record of unfruitful working for some years past, however much it may have had of the special credits to keep it going and to provide dividends. That may be perfectly true, but, as I say, you have to go on a step further, you have to consider the really anxious aspect of this account, you have to consider, assuming that you are satisfied that it was in truth and in fact a misleading document, was it deliberately concocted, was it deliberately put together with the intention of stating certain things and not stating other things so that anyone reading what was said, not knowing what was not said, would be deluded and deceived about the true nature of the company? It is said by Lord Kylsant that he knew what the position had been, he knew what the earning capacity had been, and he would say, ' Well, there is a well-secured asset here '; and then, ' We are in the trough of the wave now or we are just coming from the trough of the wave, and things will soon improve again, and then all will be well.' That is a matter which you will have to take into account.

1931.
2, 3 & 4 *Nov.*
LORD KYLSANT.
Avory, J., Branson, J., Humphreys, J.

You will bear in mind that it is always possible to be wise after the event, but on the other hand you will consider whether there was such necessity at this time for obtaining further money as to form a motive for deceit. Even that will not be enough. You must satisfy yourself, before you can find Lord Kylsant guilty, not only was there a motive, but was there an actual intention, a deliberate and criminal intention, to obtain from the investor money which he would not have parted with if he had known the true facts. It is not a question here whether what was done was done within strict business lines. It is not a question whether what was done was strictly honourable. It is a question whether an offence was committed under this penal section which carries with it in the event of conviction the consequences which invariably flow from conviction under the criminal law."

Then a little lower down he adds these words: " In the main it is quite obvious that this is, letter by letter, word by word, an accurate document, so far as it goes, and it can only be found "—(probably it should read " It can only form ")—" the basis of a charge of fraud if you are satisfied, as I have said more than once, that there was this deliberate and wicked and criminal intent to concoct a false and misleading document."

It is convenient now to refer to one or two authorities which in our view support the view of the law expressed by the learned judge in his summing-up. In the case of *Gluckstein* v. *Barnes*, reported in 1900 Appeal Cases, at page 250, Lord Macnaghten said, giving his opinion in that case, which concerned a company and its prospectus: " My Lords, it is a trite observation that every document as against its author must be read in the sense which it was intended to convey. And everybody knows that sometimes half a truth is no better than a downright falsehood." Then he proceeds to deal with the facts of that particular case.

1931.
2, 3 & 4 *Nov.*

LORD KYLSANT.

AVORY, J., BRANSON, J., HUMPHREYS, J.

In the case of *Peek* v. *Gurney*, 1873, reported in the sixth volume of English and Irish Appeals, Lord Chelmsford, in giving his opinion in the House of Lords, that being a case where the House was considering the effect of the prospectus of the company which was formed to take over the business of *Overend & Gurney*, said (at the top of page 386): "It cannot be denied that if the condition of the firm Overend & Gurney had been disclosed the result must have been their stoppage, and no hope could have been entertained of establishing a joint stock company upon the basis of a concern in such a state. The foundation of the projected company was therefore necessarily laid in concealment; and to render the scheme attractive to the public the promoters were not only compelled to hide the truth, but to give such a colour to the statements put forth in the prospectus as to render them (though perhaps literally true), yet, in the sense in which they must have known the statements would be understood by the public, really false." And in the same case Lord Cairns, in giving his opinion, said: "The first question in the case is: Did the respondents, in the prospectus issued of the company, make representations which in point of fact were untrue?"; and he says further, "This brings me, therefore, to the consideration of the prospectus; and before looking at the terms of it, I may say that I entirely agree with what has been stated by my noble and learned friends before me, that mere silence could not, in my opinion, be a sufficient foundation for this proceeding. Mere non-disclosure of material facts, however morally censurable, however that non-disclosure might be a ground in a proper proceeding at a proper time for setting aside an allotment or a purchase of shares, would, in my opinion, form no ground for an action in the nature of an action for misrepresentation. There must, in my opinion, be some active misstatement of fact, or, at all events, such a partial and fragmentary statement of fact, as that the

1931.
2, 3 & 4 *Nov.*

LORD KYLSANT.

Avory, J., Branson, J., Humphreys, J.

withholding of that which is not stated makes that which is stated absolutely false."

Lastly, we come to the case which was quoted by the learned Attorney-General in his opening, of *Aaron's Reefs* v. *Twiss*, reported in 1896 Appeal Cases, in which Lord Halsbury, in giving his opinion, said this (on page 281): "Inasmuch as the jury have found that, I think, upon very good evidence in the prospectus itself"—that is, that it was calculated to induce persons to invest money—"it remains only to consider the final question, namely, whether or not there was evidence for the jury which would justify them in finding that this was a fraudulent prospectus—that these statements were fraudulent and false. Now, in dealing with that question, again, I say, I protest against being called on only to look at some specific allegation in it; I think one is entitled to look at the whole document and see what it means taken together. Now, if you look at the whole document taken together, knowing what we now know and what the jury had before them, I suppose nobody can doubt that this was a fraudulent conspiracy. I observe that one or two of the learned judges below used very plain language upon it, and remarked upon the fact that Mr. Gilbert, who seems to have been the head and front of it, was not subjected to an inquiry in a criminal court. But, be that as it may, the question before your Lordships now is whether the jury were justified in finding with these facts before them that they did find. It is said there is no specific allegation of fact which is proved to be false. Again I protest, as I have said, against that being the true test. I should say, taking the whole thing together, was there false representation? I do not care by what means it is conveyed—by what trick or ambiguous language; all those are expedients by which fraudulent people seem to think they can escape from the real substance of the transaction. If by a number of statements you intentionally give a false impression and induce a person to act upon it, it is not the

less false although if one takes each statement by itself there may be a difficulty in showing that any specific statement is untrue." Then a little later on he says, dealing with that particular case: "The whole of this transaction seems to me to have been fraudulent to the last degree, and I entirely concur with those learned judges who, in very plain language, said that the persons engaged in this transaction were guilty of a fraudulent conspiracy, and might have been indicted for it."

In the opinion of this Court, those passages are sufficient to support the summing-up so far as it consisted in a direction on the question of law arising in this case. It is true that they are opinions expressed in civil proceedings, but we think they are none the less applicable in this case, those principles which are there laid down, particularly in view of the fact that in the last case Lord Halsbury had in mind and gave expression to his view on the criminal law as well as the civil law. And in the present case we find that the learned judge on more than one occasion specifically called the attention of the jury to the distinction which they must bear in mind between a possible civil liability and a criminal liability, and in the opinion of this Court there was ample evidence upon which the jury could come to the conclusion that this document, the prospectus, was false in a material particular, in that it conveyed a false impression, the falsity in this case consisting in putting before intending investors as material upon which they could exercise a judgment about the existing position of the company, figures which apparently disclose the existing position but in fact conceal it. In other words, the document implied that the company was in a sound financial position, and that a prudent investor could safely invest in its debentures. This implication arises particularly from the statement that the dividends have been regularly paid over a term of years, although times have been bad, a statement which is entirely misleading when the fact that they were paid not out of

1931.
2, 3 & 4 *Nov.*

LORD KYLSANT.

AVORY, J., BRANSON, J., HUMPHREYS, J.

current earnings but out of earnings in the abnormal war period, is omitted.

The further question is whether there was evidence upon which the jury could properly find that the appellant knew that this document was false. If there was evidence that the document was false in the particulars already indicated, there was ample evidence upon which the jury could find that the appellant knew of its falsity, knowing as he did of the means by which the dividends had been paid; and it is not and cannot be disputed that the prospectus was published with intent to induce persons to entrust or advance money to the company, which was sufficient to satisfy the section. But the learned judge told the jury, in the passage that I have already read, that upon this third count also they must find the intention to defraud, and he repeated this, after the jury had retired and sent their written question to him. In these circumstances the jury must be taken to have found that what was done in this case was done with an intent to defraud.

In the result, we come without hesitation to the conclusion that in the summing-up, regarded as a whole, there was no misdirection, that there was ample evidence upon which the verdict of the jury can be supported, and that this appeal must be dismissed.

I intended to add, with reference to what took place after the jury had retired and asked a question of the learned judge, that in the opinion of the Court the direction to the jury by the learned judge was too favourable to the accused, and that he ought to have told them that on this third count it was sufficient if they found an intent to induce persons to subscribe or advance money to the company.

Appeal dismissed; leave to appeal against sentence refused.

Solicitors for appellant: Holmes, Son & Pott.

BEFORE

MR. JUSTICE AVORY, MR. JUSTICE HAWKE AND MR. JUSTICE HUMPHREYS.

HARRY CARTER.

1931.
9 (& 11) *Nov.*

Evidence equally consistent with innocence and guilt.

On an indictment for indecent assault the absence of evidence directly implicating the accused may be a ground for quashing a conviction.

Appeal against conviction.

Appellant was convicted at Cheshire (Knutsford) Sessions on October 12, 1931, of indecent assault on a girl under thirteen years of age, and was sentenced by the Chairman to six months' imprisonment with hard labour.

Francis Williams, for the appellant (under section 10 of the Criminal Appeal Act, 1907), who was present:

There was no sufficient evidence to justify the jury in convicting appellant. All that the prosecution proved was that some injury was done to the child and that appellant had the opportunity of committing the offence. Emphasis was laid on a statement made by appellant on arrest, which was alleged to be false, but three-quarters of an hour later he gave a full account of his movements at the crucial time to a police-sergeant.

Clyde T. Wilson, for the Crown:

The appellant told the police-constable, in answer to his questions, that he had not seen a little girl at the time in question. The case was by no means a strong one, but there was just sufficient evidence to justify the jury in convicting.

AVORY, J.: The evidence for the prosecution amounted in fact to this only, that the little girl, who was under thirteen years of age, had been, on the afternoon in question, in the company of the appellant. There was no complaint

1931.
9 (& 11) *Nov.*

HARRY CARTER.

Avory, J., Hawke, J., Humphreys, J.

that she was improperly in his company or had been improperly taken away from her home. After the appellant had sold some cotton to the child's mother, the child, at her own request, was allowed to walk with the appellant on his way to other houses. She went with her mother's consent and was undoubtedly absent for a period of about half an hour. She was seen walking with the appellant in the main road, where he was calling at the houses, and came back with him. He then left her with her little brother and some other children to play. It is impossible to say how long she was playing with these other children, but she left by herself to go home, and there is no evidence which way she went when she left them or what might or might not have happened to her on her way home. While playing she was not complaining of anything or crying. When she arrived home she undoubtedly made some complaint to her mother, and on examination it was found that she had sustained some injury to her private parts.

The only other evidence which it was suggested there was against the appellant was that of a police-constable, who said that he had found the appellant in the neighbourhood, and told him that he was making inquiries about a little girl who had been assaulted and that the appellant replied, "I have not seen a little girl." The appellant's own account was that he said to the police officer, "I have not hurt any little girl." No note of the statement appears to have been taken, and it is quite clear that there might have been an honest mistake by the police-constable. When we come to consider the evidence as a whole, it seems to be clear that the evidence is as consistent with the innocence of the appellant as with his guilt.

In all the circumstances, we have come to the conclusion that this conviction was unsatisfactory and cannot be supported, having regard to the evidence. The appeal is allowed and the conviction quashed.

Conviction quashed.

ARTHUR WILLIAMS.

1931.
9 (& 11) *Nov.*

ARTHUR WILLIAMS.

Avory, J.,
Hawke, J.,
Humphreys, J.

Severity of sentence, in view of lapse of time since the last conviction.

Appeal against sentence.

Appellant pleaded guilty at the West Kent Sessions on October 15, 1931, to housebreaking and larceny, and was sentenced by the Chairman to five years' penal servitude.

Appellant in person.

No counsel appeared for the Crown.

AVORY, J.: It is undoubtedly true, as the Chairman said, that the appellant has been in trouble as far back as 1902, and that on one occasion he was sentenced to three years' penal servitude, and on another occasion to five years' penal servitude; but we must take notice of the fact that his last conviction was in April, 1928. He was released early in July, 1929, and it was nearly two years before he committed the offence now in question.

We think that the Chairman did not give sufficient weight to the period that had elapsed since the appellant's last conviction, and in all the circumstances we have come to the conclusion that the sentence may properly be reduced to one of eighteen months' imprisonment with hard labour, to date from conviction.

Sentence reduced.

1931.
9 (& 11) *Nov.*

JOHN WILSON.

Avory, J., Hawke, J., Humphreys, J.

JOHN WILSON.

Youth—First Conviction—Borstal Discipline.

Severity of sentence in the case of a youth convicted for the first time.

Appeal against sentence.

Appellant pleaded guilty at the West Kent Sessions, on October 15, 1931, to housebreaking and larceny, and was sentenced by the Chairman to three years' detention in a Borstal institution.

Appellant in person.
No counsel appeared for the Crown.

AVORY, J.: The appellant has not been previously convicted of any offence. There was evidence that after leaving school he had work in a factory and was led into the commission of this offence through association with some other youths at a time when he had lost his employment. We have received information from the Probation Officer, and we have come to the conclusion that this sentence may properly be remitted, in view of the fact that there does not seem to be any sufficient evidence of the fact that he is a person of criminal habits or tendencies. The order of the Court is that the appellant be bound over for two years and placed in the care of his stepfather, who will convey him to his home, where his former employer will find work for him immediately.

Sentence reduced.

T. R. F. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE HUMPHREYS.

FREDERICK NEWBERY. BURNETT LEON ELMAN.

1931. 16 & 17 *Nov.*

Co-defendants—Misdirection—Intent—Guilty Knowledge—Conspiracy—Obtaining by False Pretences.

A summing-up on a joint indictment containing several counts must carefully distinguish the evidence against each defendant, and when fraudulent intent is the gist of the offence must insist that guilty knowledge must clearly be found to justify a conviction.

See p. 66, above, where for " the Recorder " read " the Commissioner."

Appeals against conviction, and application by Newbery for leave to appeal against sentence.

Appellants were convicted, after a trial lasting thirteen days, before the learned Commissioner at the Central Criminal Court on July 8, 1931; Newbery, who was convicted of conspiracy to defraud and of obtaining money by false pretences, was sentenced to two years' imprisonment with hard labour and three years' penal servitude (concurrent); Elman, who was convicted of obtaining money by false pretences only, was sentenced to twelve months' imprisonment with hard labour.

The Court decided to hear the two appeals separately.

Norman Birkett, K.C. (*D. L. Finnemore* and *A. P. Marshall* with him), for appellant Newbery, who was present, having surrendered to bail:

Newbery was convicted on two counts charging conspiracy, and twenty-one counts for obtaining money by false

1931.
16 & 17 *Nov.*

FREDERICK NEWBERY.
BURNETT LEON ELMAN.

Hewart, L.C.J., Avory, J., Humphreys, J.

pretences. The nature of the conspiracy alleged was that Newbery, together with Elman and a man named Spellen who was also convicted, together with one Jacob Factor and other persons who had not been before the Court, but who acted as selling agents, conspired to defraud the public by inducing them to buy certain shares. These shares were, it was alleged by the Crown, worthless, and worthless to the knowledge of the conspirators. Each of the counts relating to false pretences alleged that the appellant had falsely represented to a particular individual that the Broad Street Press, Ltd., was a genuine concern dealing in genuine shares, when he knew it was not. The grounds of appeal are (i) there was no evidence against Newbery; (ii) the verdict was against the weight of the evidence; (iii) misdirection on law and fact. Newbery is 68 years old, and was of unblemished character before these charges; he had carried on the business of a mining engineer for thirty years. The matters in which he took part were such as any innocent man might have taken part in, and his case should have been examined as an entirely separate issue, and the jury should have been warned not to be influenced by extraneous matters. The Broad Street Press, Ltd., was registered in September, 1928, and published a financial newspaper. For a considerable time good advice in regard to sound shares was given in the paper, and confidence was thus built up; then advice was given to purchase shares of which Factor, who was the real editor of the paper, desired to dispose. In March, 1930, a stock and share department was opened by the Broad Street Press, Ltd., as outside brokers. Successful deals were there carried out for a time, but later the purchase of shares in two mining companies was recommended. The Broad Street Press, Ltd., sold quantities of 10s. shares in those companies at par and above, having acquired those shares at 7d. in the one case and 8d. in the other. Newbery had nothing to do with the way in which the shares which the Broad Street

1931.
16 & 17 *Nov.*

FREDERICK NEWBERY.
BURNETT LEON ELMAN.

Hewart, L.C.J., Avory, J., Humphreys, J.

Press, Ltd., had acquired were foisted on the public; all that Newbery did was to enter into transactions by which the shares became the property of the Broad Street Press, Ltd. The argument on behalf of the appellant on this part of the case may be summarised under four heads: (1) The mining properties were acquired and the companies promoted in good faith, there being no evidence to the contrary; (2) The vendor's shares were sold in good faith, without any knowledge that they were later to be sold to the public at exorbitant prices; (3) The appellant was not connected with the subsequent dealings in shares by the Broad Street Press; (4) The appellant never received any profit from the sale of those shares to the public. With regard to the summing-up, the judge failed to direct the jury that certain evidence which was evidence of the conspiracy charges was not evidence on the charges relating to false pretences.

In LUBERG, 135 L. T. 414; 90 J. P. 183; 28 Cox C. C. 264; 19 Cr. App. R., at p. 140: 1926; *c.q.* Sankey, J., in giving the judgment of the court, said: "The question is, 'Was it proved that they knew?' . . . The sort of way in which that knowledge was desired to be imputed to the other defendants was that they were at the business every day, that they knew how things were going on, that one of them was the secretary of the company and the other the traveller. The jury were asked to say (1) 'They must have known'; (2) 'They did know.'" In the case of one defendant, the learned judge said (*ib.*): "It looks rather as if what happened was that a great volume of evidence was thrown at the heads of the jury, who formed their opinion without really having sufficient evidence or without sufficient direction on what facts they could convict."

There was, further:—

(1) Misdirection by way of nondirection, in that the case for the appellant was never put to the jury. The judge put the point of view of the prosecution to the jury, and

1931.
16 & 17 *Nov.*

FREDERICK NEWBERY.
BURNETT LEON ELMAN.

Hewart, L.C.J., Avory, J., Humphreys, J.

promised later to put the point of view of the defence, but never did so. He told them they must weigh the evidence and decide what they could believe, but he gave them no further direction on this.

(2) The judge assumed all the time that the shares of one of the mining companies were worthless, and did not direct the jury to any evidence which proved them worthless. In fact, evidence was given—some by a witness for the prosecution—that they were not worthless, and no evidence was given by the prosecution that they were worthless. It was not right to assume that the shares were worthless, and the jury should have been directed to consider this.

(3) The judge did not direct the jury to consider whether appellant believed that the shares were of value. No evidence of his belief was put to them, though witnesses were brought to prove this.

(4) He did not put to the jury the point that appellant did not get a penny by the conspiracy. He was convicted of obtaining money by false pretences, but he never made a false pretence and got no money. There was no evidence that he knew that the Broad Street Press had been advising the public to buy. The conclusion was that his case was never put to the jury.

The judge, full of consideration for the jury who were tired after so many days' trial, should have considered the defendant, who was entitled to the most careful direction. It would be a lamentable thing if the true interest of a defendant should suffer to relieve the jury—the judge's primary duty was not to the jury but to the true administration of justtice.

There was misdirection in law on all the counts dealing with false pretences and on all the counts dealing with conspiracy. There was no evidence to go to the jury on the charges of conspiracy. If that is correct, the charges of false pretences must go too. Counsel again quoted the

1931.
16 & 17 *Nov.*

FREDERICK NEWBERY.
BURNETT LEON ELMAN.

Hewart, L.C.J., Avory, J., Humphreys, J.

judgment of Sankey, J., in LUBERG, 19 Cr. App. R., at 140: 1926; *c.q.* (above).

Roland Oliver, K.C. (*J. Flowers, K.C.*, and *St. J. Hutchinson* with him), for Elman, who was present, having surrendered to bail:

Beyond the common ground of conspiracy, there was no point in the other appellant's case with which Elman had anything to do. He did not suggest that they should not have been tried together, but it was most important that the jury should be directed on keeping the case of each one separate.

In the indictment counts 1 to 3 were for conspiracy in connection with the shares of the Rhodesia Company, 4 to 24 for false pretences due to that conspiracy, 3 and 25 to 27 for conspiracy in connection with the Sunbeam Press Company. So far as counts 4 to 24 were concerned, there was no evidence at all against Elman, and counsel for the Crown said so. He was convicted on all these counts without a shadow of evidence. There is a danger in a large prosecution in pitching things altogether at a jury without pointing out what is urged against each individual. If there was no evidence for conviction on false pretences, then counts 1 and 2 also go. The judge should have put it to the jury that they must consider whether the appellant knew that the shares were going to be sold to individuals as valuable shares.

Counsel summarised his conclusions thus:—

(1) On twenty-three counts Elman was convicted without a "rag" of evidence; six were lumped in with others without any critical examination of evidence. All the evidence was applied to both the prisoners.

(2) On the Sunbeam issue, evidence for the defence was never put to the jury, as it was not in Newbery's case. The price asked for the shares in the Sunbeam Company was the market value at the time. The prosecution alleged that the market had been rigged. In fact, the market had

1931.
16 & 17 *Nov.*

FREDERICK NEWBERY.
BURNETT LEON ELMAN.

Hewart, L.C.J., Avory, J., Humphreys, J.

not been rigged; and if it had been, no evidence was brought by the prosecution to show that Elman knew it.

(3) The points that had to be proved by the prosecution were assumed, and were assumed in the summing-up. There was no evidence that Elman was party to the general conspiracy. No other evidence was put to the jury at all.

Byrne (with him *Sir Percival Clarke*), for the Crown: It is difficult to say that the summing-up was a satisfactory one. It can be shown that the two appellants knew quite well that they were taking part in a conspiracy. Newbery had spent his life in dealing with companies, and must have known what was being done. Letters and cables were put in evidence to show that Newbery understood. There was material on which the jury could well conclude that the prospectus had been produced for the purpose of deluding the public, and that Newbery was necessary for producing the shares. The jury were entitled to come to the conclusion that he must have known.

With regard to Elman, it is admitted that the charges on twenty-one counts should have been withdrawn. The real matter in regard to the Sunbeam Press Company was that the shares had been rigged, and that there was evidence that Elman knew that a demand had been created for the shares to put up the price. He was solicitor to the Broad Street Press, and must have known that they were a share-pushing company.

On the question of misdirection or non-direction, he could not deal with it; but there was a great deal of evidence before the jury, and the court might say that no miscarriage of justice had taken place. He could not say absolutely that with proper direction the jury would certainly have come to the same conclusion.

THE LORD CHIEF JUSTICE: These appellants were convicted at the Central Criminal Court on an indictment containing twenty-seven counts. The first two counts

1931.
16 & 17 *Nov.*

FREDERICK NEWBERY.
BURNETT LEON ELMAN.

Hewart, L.C.J., Avory, J., Humphreys, J.

charged both with conspiracy with other persons to defraud the public by inducing them to buy certain worthless shares, and the fourth to the twenty-fourth counts charged the appellants and another defendant with obtaining money by false pretences that the Broad Street Press, Ltd., was carrying on a genuine business and that the prices paid for the shares were fair and proper prices. Finally, counts 25 to 27 charged the three defendants with obtaining money by the same false pretences in relation to the Sunbeam Press Company.

The appellants were convicted on all counts against them, and they now appeal against conviction, and Newbery also applies for leave to appeal against sentence. It was a long case—the trial lasted thirteen days—and there was ample evidence to show that the public had been deceived by what is called share-pushing. With regard to Elman, it was promptly conceded by learned counsel for the prosecution that he ought not to have been convicted on counts 4 to 24, or any of them—and indeed he was convicted on all. The evidence showed that a great number of witnesses had lost their money as the result of share-pushing; an atmosphere of prejudice was created, in which it became essential to keep separate the parts played by individuals. It is not denied there is some evidence against Newbery on a particular point, and some evidence against Elman, but in the summing-up, no doubt abbreviated out of consideration for a jury after thirteen days' trial, no sufficient distinction was drawn between the cases of these two appellants and the cases of the two arch-conspirators who had fled.

We have come to the conclusion that that criticism is sound, and the state of affairs that existed is illuminated by the fact that the jury, notwithstanding what was said by counsel for the prosecution, convicted Elman on counts 4 to 24 as well as the rest. Having regard to the summing-up, we have come to the conclusion that this trial was not satisfactory and it is not possible to say that, given a proper

1931.
16 & 17 *Dec.*

FREDERICK NEWBERY.
BURNETT LEON ELMAN.

Hewart, L.C.J., Avory, J., Humphreys, J.

direction, the jury would still have come to the same decision. Accordingly, the appeals are allowed and the convictions quashed.

Convictions quashed.

E. B. A.

Solicitors—Messrs. Reid, Sharman & Co.; Messrs. E. W. Long & Co., for appellants.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE HAWKE.

1931.
23 *November.*

CECIL JOHN RABBITT.

Contradictory Evidence by Material Witness—Alibi—Evidence for the Defence—Summing Up—Questions to Witness by Judge.

Detailed evidence of an *alibi* and other evidence must be carefully dealt with in the charge to the jury. The judge should not put questions to a witness suggesting that he (the judge) is satisfied of defendant's guilt.

Appeal against conviction and sentence and application for leave to call further evidence.

Appellant was convicted, at the Central Criminal Court on October 15, 1931, of larceny in a dwelling-house and of putting the occupant in bodily fear, and on a second count of assaulting her with intent to steal, and was sentenced by the Recorder to three years' penal servitude.

The facts of the case are given in the judgment.

1931.
23 *November.*

CECIL JOHN RABBITT.

Hewart, L.C.J., Avory, J., Hawke, J.

G. G. Raphael, for appellant, who was present:

The evidence against the appellant was threefold: (1) the identification by the woman assaulted; (2) a statement made by a man, Priest; and (3) the finding of a revolver in a bureau, as mentioned by Priest. As regards (1), the woman identified him with difficulty, and he had been in the dock on another charge three days before, and she might have seen him there; as regards (3), it is most likely that if the statement made by Priest was concocted, he would use any material to support his story and that the pistol would be where he said it was. This was not, therefore, corroboration, though so put to the jury in the summing-up.

The learned Recorder criticised the appellant for not having disclosed his *alibi* at the police court, and cited A. BROWN AND J. BRUCE, 23 Crim. App. Cases 56: 1931; *c.q.* as a decision that he ought to have done so. His *alibi* was in the form of letters, and the learned Recorder cast a doubt on these and suggested to the jury that the witness who signed them and was in court to give evidence, might have concocted them, although no such suggestion was made to the witness.

Regarding the case as a whole, there was a confusion with the receiving case which must have prejudiced appellant before the jury, and this was increased by the attitude of the learned Recorder.

Vernon Gattie, for the Crown:

The case was essentially one for a jury, and the summing-up, taken as a whole, was clear, telling them to make up their own minds who was telling the truth.

AVORY, J.: This appellant was convicted at the Central Criminal Court on an indictment charging him on the first count with stealing in a dwelling-house on June 19, and by menace or threat putting a girl named Doris Wood in bodily fear, and on the second count with assaulting her

1931.
23 *November.*

CECIL JOHN RABBITT.

Hewart, L.C.J., Avory, J., Hawke, J.

with intent to steal. On June 19 some man came to the door of the house where she was in service near Bromley, representing that he came from house agents as the house was to let, and gained admission. Then he seized hold of the girl, locked her in a room and proceeded to ransack the house and take away some property. It was admitted that the appellant was a man of perfectly respectable character, a working jeweller with a shop which had recently failed, and he was now living near Bromley, trying to find work. Therefore on the face of it, it was an offence of a nature unlikely to be undertaken by one obviously an amateur at such matters; and not until July 10 did Doris Wood first have the opportunity of identifying the man, and obviously she had some hesitation in picking out the appellant. The learned Recorder quite properly, in view of the lapse of time and of the fact that she wore glasses, put it to the jury that it would be unsafe to act on that identification alone.

The only other evidence was that of a man named Priest, who had some seven years ago been convicted of some dishonesty and who on August 7 was bound over on a charge of stealing silver articles from his employer. On being arrested on June 26 on this charge, he had obviously communicated to the police that he might be able to get back some article which he had sold to the appellant. He was allowed to visit him on June 26, and he gave evidence that appellant confessed to stealing at the house in Bromley and showed him a toy revolver. One would have thought that at least the jury would have been warned before they accepted a story of that kind; but so far from warning them the learned Recorder appears to have said: "If Rabbitt is a guilty man and has done this thing, it is only to a criminal that he would unbosom himself." That story was communicated to the police, and he was charged with the offence on July 10, and in the meantime he was charged with receiving property knowing it to have been stolen.

1931.
23 *November.*

CECIL JOHN RABBITT.

Hewart, L.C.J., Avory, J., Hawke, J.

On August 7, Priest having given evidence which was in favour of the appellant, the case of receiving was dismissed on the ground that there was no evidence against the appellant. At the Central Criminal Court it was abundantly clear that Priest said over and over again that the appellant knew the property was stolen, giving evidence quite inconsistent with what he gave before. This was a further reason why the jury should have been seriously warned against acting on his evidence. The learned Recorder seems to have been under a misapprehension, because early in his summing-up he said: "Here you get a curious interlocking of two cases, which I much regret." But the other case had clearly much to do with this case, because it showed that Priest, apart from his conviction, could not be relied on. The defence was then put in that on June 19 appellant was at Edgware. It is open to criticism that this defence was not put in earlier, but from the nature of it it was obviously one to be treated seriously, not brushed aside by the learned Recorder as possibly concocted by the witness Silver and appellant. Silver was a perfectly credible witness, and proved that on the afternoon of June 19 appellant came by appointment to see him at Edgware, pursuant to a letter which was produced, dated June 17, addressed to the appellant and signed by Silver, asking him to call and see him between 2 and 6 in the afternoon. He says that appellant did call soon after 2 p.m.; he remembers it because he was called from his dinner, and stayed with him for two hours discussing work. This was confirmed by another letter signed by him, dated June 22, in which he said, "*re* our interview of June 19th." The learned Recorder took the view that this was not to be relied on, and harassed the witness about his not keeping a carbon copy, and added: "Anybody might write this letter at any time—it might have been done since the committal." Then he said to Mr. Silver, "You are very glad you did not employ him?" and Mr. Silver said, "I am pleased

1931.
23 *November.*

CECIL JOHN RABBITT.

Hewart, L.C.J., Avory, J., Hawke, J.

I did not," conveying to the jury " you are pleased you did not engage a man who committed the crime with which appellant was charged." Another passage in the summing-up conveyed to the jury that the appellant knew all the time that Priest was a thief.

All this is an attitude towards the defence of *alibi* which has led us to the conclusion that the verdict was unsatisfactory and cannot be supported by the evidence.

Conviction quashed.

E. B. A.

Solicitors for the appellant: Wontner & Sons.

BEFORE

MR. JUSTICE AVORY, MR. JUSTICE CHARLES AND MR. JUSTICE HUMPHREYS.

1931.
7, 9 *Dec.*

WILLIAM BERNARD MEDCRAFT.

Corroboration—Prisoner's Evidence—Circumstances of the Case—Fresh Evidence by Leave of the Court—Appeal Dismissed—Sentence running from date of Conviction—Appellant as witness on Appeal.

There may be corroboration of accomplices in the prisoner's own evidence and in the circumstances of the case, including his own conduct.

The Court will not, as a rule, allow the appellant to give evidence.

Proviso to section 4 of the Criminal Appeal Act, 1907, applied.

In exceptional circumstances when the Court hears fresh evidence it may, though it dismisses the appeal, allow sentence to run from the date of conviction.

1931.
7, 9 *Dec.*

WILLIAM BERNARD MEDCRAFT.

Avory, J., Charles, J., Humphreys, J.

Appeal against conviction, and application for leave to call further evidence.

Appellant was convicted at Leicester City Quarter Sessions, after a trial lasting six days, of knowingly receiving stolen goods, and was on October 14, 1931, sentenced by the Recorder to three years' penal servitude and was ordered to pay the costs of the prosecution.

Sir Henry Curtis-Bennett, K.C. (with him *St. John Hutchinson*), for appellant, who was present:

The case for the Crown rested largely upon the evidence of the two thieves, and emphasis was laid on the contention that there could have been no collaboration between them with regard to statements implicating the appellant which they made to the police when in prison on remand. It is desired to call three witnesses, including appellant, with regard to a conversation between the two thieves in the association yard at Leicester Prison. The information with regard to this evidence was not in the possession of the appellant at the trial.

Leave was granted by the Court to call one witness but not the appellant, and *Curtis-Bennett* called a convicted man who was undergoing a sentence of penal servitude in Leicester Prison. He gave evidence of an alleged conversation between the two thieves with regard to their statements, part of which he said that he had overheard.

He was cross-examined by *Maurice Healy*.

Counsel relied, further, on a number of points of alleged misdirection and non-direction in the summing-up. In particular there was no proper direction on corroboration; the Recorder laid down the well-known rule, but he never directed the attention of the jury to any items of the evidence that could be held to be corroboration.

[HUMPHREYS, J.: I can understand the necessity for such direction if, perhaps, there was only one point of corroboration.

1931.
7, 9 *Dec.*

WILLIAM BERNARD MEDCRAFT.

Avory, J., Charles, J., Humphreys, J.

AVORY, J.: No one who has read appellant's own evidence could fail to find corroboration.]

Maurice Healy, K.C. (with him *Douglas Jenkins*), for the Crown:

The case for the Crown was not that there were four separate crimes but that this was a case of systematic receiving. In such a case the unusual conduct of appellant afforded corroboration, and the jury may well have found the necessary corroboration in the circumstances of the case. Moreover, without the testimony of the accomplices, there was ample evidence on which to convict.

AVORY, J.: There is evidence corroborating the accomplices in the evidence of the appellant himself. It is admitted that his course of conduct was entirely inconsistent with innocence and was consistent with the story told by the accomplices, and thus materially corroborated them. The summing-up was not perfect, but the proviso to section 4 of the Criminal Appeal Act of 1907 was passed to meet such cases: there was no "substantial miscarriage of justice."

Curtis-Bennett asked that sentence might be allowed to run from the date on which it was passed, as the Court had granted appellant's application for leave to call further evidence.

AVORY, J., said that, in the circumstances of the particular case, the sentence would be allowed to run from the date on which it was passed.

Appeal dismissed.

Solicitors: for appellant, Robinson & Bradley, for Harding & Barnett, Leicester; for the Crown, Wright, Woodrow & Aysom, Leicester.

T. R. F. B.

BEFORE

MR. JUSTICE AVORY, MR. JUSTICE HAWKE AND MR. JUSTICE HUMPHREYS.

FREDERICK THOMAS MILLWARD.

1931.
14 *December.*

Murder—Manslaughter—Provocation by Adultery—Rider by Foreman of Jury Ill-expressed.

Mere suspicion of adultery by a wife is not enough to reduce killing by the husband from murder to manslaughter. A finding of guilty is not affected by a rider to the verdict.

Application for leave to appeal against conviction.

Appellant was convicted of murder at Stafford Assizes on November 20, 1931, and was sentenced to death by Swift, J.

W. G. Earengey, K.C. (with him *J. F. Bourke*), for appellant, who was present:

The case put forward by the Crown was that the appellant early one morning of July last had entered the washhouse in his premises where the deceased man Hill was asleep and had struck him on the head with an axe and had killed him. One of the defences was that the appellant, not knowing that Hill was there, came to the washhouse for some firewood and found his wife therein in adultery with Hill; alternatively, that he found her in such circumstances that any reasonable man would have assumed that adultery had just taken place or was just about to take place. The wife's evidence was that Hill attempted to commit a rape upon her, but that he desisted on the appellant's appearance just in time, and she escaped from the washhouse before any struggle took place between him and Hill. It would be sufficient provocation to reduce the charge to manslaughter, not only if there had been

1931.
14 *December.*

FREDERICK THOMAS MILLWARD.

Avory, J., Hawke, J., Humphreys, J.

voluntary adultery, but even if the circumstances were such that the husband reasonably inferred that adultery had just taken place or was about to take place. The essence of this defence was passion leading to the loss of self-control, and this would apply if the husband's inference from what he saw was subsequently found to be incorrect, provided that it was reasonably drawn. The cases did not define "found in the act of adultery," but on principle this should extend to finding in such circumstances that a normal man would infer it. No clear direction was given to the jury that if they were satisfied that there was provocation on any of these grounds, they could and should find appellant guilty of manslaughter only. Another plea was that of self-defence, as the appellant said he entered the washhouse to chop wood with the axe, and Hill, who was a much stronger man, struggled with him for the possession of the axe. The jury brought in a verdict of murder with a recommendation to mercy. The answer of the foreman of the jury, made at the moment without consultation with his fellows, when the learned Judge asked for the grounds of the recommendation, showed either that the jury did not understand the summing-up or that the summing-up was not complete. The rider was as follows: "The members of the jury think that it was the circumstances in which Millward entered the door of the washhouse and what he might have seen, and that he was provoked under those circumstances at the attitude of his wife and the man that he killed. We think under those circumstances it was very hard lines on him, and while we don't believe that it was sufficient to warrant a verdict of anything else, we think the man must have seen some other sort of light [*sic*] than what he did. We also have considered the question of his home effect. We are really sorry for the man. He stayed at home and had to look after the children, while his wife was out in other ways. It is on those grounds that we make our recommendation."

1931.
14 *December.*

FREDERICK THOMAS MILLWARD.

Avory, J., Hawke, J., Humphreys, J.

It was clear that the jury had not accepted the case for the Crown that Hill had been killed in his sleep, and the verdict should have been either manslaughter or not guilty. The verdict was against the weight of evidence.

Ralph Thomas, for the Crown, was called upon only to argue on the real meaning of the observations of the foreman:

It is obvious that the foreman was not used to expressing his views in public. The jury did not go out again, they did not consult together. It looks as though the jury were not considering the physical attitude of the couple, but their association before. "Hard lines" meant the circumstances in which he was living before the crime. "What he might have seen there" meant "what he saw there," and did not necessarily mean that the jury thought that Mrs. Millward was there at all. "We do not believe that the circumstances warrant a verdict of anything else," shows quite clearly that they did not misconceive the case. "Another sort of light" meant "another construction of circumstances," *i.e.*, "mental light." The jury were obviously sympathetic, and if they could have reduced the verdict would have done so.

AVORY, J.: The appellant was a man of good character and was a hardworking man. Deceased was described as a big, powerful man, 6 feet 3 inches tall and over 13 stone in weight, quarrelsome and bad-tempered. The wife made statements quite inconsistent with the evidence she gave at the trial. In view of that the jury were justified in disbelieving her. Nobody could doubt that if the jury had any grounds for believing that Hill was attempting to assault Mrs. Millward they would have returned a verdict of manslaughter. No exception can be taken to the summing-up: the learned judge twice referred to adultery actually being committed as a ground of provocation. In one passage the learned judge directed the jury that if

1931.
14 *December.*

FREDERICK THOMAS MILLWARD.

Avory, J., Hawke, J., Humphreys, J.

they thought that the conduct which Mrs. Millward said took place was really proved, there was sufficient provocation to reduce the crime to manslaughter if the blows were struck in consequence of that conduct. There he was obviously pointing out that even if the jury did not accept the suggestion that adultery was actually being committed, yet if they accepted her evidence that Hill had laid hold of her in the way she described, and appellant found them in that position, they would be justified in reducing the crime to manslaughter. The only other matter is that the jury in returning their verdict added a very strong recommendation to mercy. On te learned judge asking for the grounds, the foreman, without consultation, did his best to give expression to what he understood to be the views of the individual members, which may or may not have been discussed or expressed in the jury room. It is quite clear that the foreman, in making the effort, was not able to express himself in very clear language. It is difficult, in fact, to follow the words " the jury think it was the circumstances in which Millward entered the door of the washhouse, and what he might have seen, and that he was provoked under those circumstances at the attitude of his wife and the man," but it may well be that it means the attitude of the wife, not physical attitude at all, but what had been spoken of, that the appellant was much aggrieved at the conduct of his wife in going out with Hill to public-houses to drink, and had, in fact, protested. They go on to say, " we think under those circumstances it was very hard lines on him, and while we do not believe that it was sufficient to warrant a verdict of anything else," which means " sufficient to warrant a verdict of manslaughter." It is no use to conjecture exactly what is meant by the rest of the rider. The jury evidently felt sorry for the appellant. In the result, we have come to the conclusion that there is nothing in this rider or in reason which in any way qualifies the verdict given or is in any

1931.
14 *December.*

FREDERICK THOMAS MILLWARD.

Avory, J.,
Hawke, J.,
Humphreys, J.

way inconsistent with it. Therefore the appeal must be dismissed. The recommendation to mercy has no doubt already been forwarded to the proper quarter.

Appeal dismissed.

Solicitors for appellant: William Waldron & Son, Brierley Hill, Staffs.

E. B. A.

PERCY HERBERT.

1931.
14 *December.*

PERCY HERBERT.

Avory, J.,
Hawke, J.,
Humphreys, J.

Habitual Criminal—Statutory Notice of Previous Convictions—Evidence of Offences and Misconduct Not Mentioned in the Notice.

Despite irregular admissions in evidence of offences not in the list of the statutory notice to persons alleged to be habitual criminals, the Court may refuse to interfere if it is satisfied that in the absence of such evidence the jury would have found the same verdict.

Appeal against sentence and application for leave to appeal against conviction.

Appellant was convicted of housebreaking at Monmouthshire (Usk) Sessions on October 14, 1931, and was sentenced by the Chairman to three years' penal servitude. He was also found to be a habitual criminal, and was sentenced to five years' preventive detention.

R. G. Micklethwait, for the appellant (under section 10 of the Criminal Appeal Act, 1907), who was present:

There were two convictions which were not included in the statutory notice given to appellant under section 10, sub-section 4 of the Prevention of Crimes Act (8 Edw. 7, c. 59), but were included in the list put in evidence before the jury. They were in 1917, and were not of importance,

1931.
14 *December.*

PERCY HERBERT.

Avory, J., Hawke, J., Humphreys, J.

but the rule is absolute. Evidence was also given of appellant's bad character generally, that he had twice escaped from a reformatory and once from a training ship, that he had joined the Army in a false name, that his character in the Army was bad; none of which was covered by the notice which charged his leaving his employment without reason twice, but evidence was given of four occasions. As regards the summing-up, what the learned Chairman said was: " It is necessary for you to be satisfied that the accused has not made any attempt to lead an honest life, and that he led a criminal life. You have heard also of the attempt to reform him. It is for you to look at the list and to decide." He ignored any attempts of the accused to get work, though the police admitted that since his last release he had tried to get work. Counsel referred to F. HARRIS, 1922, 2 K. B. 547; 91 L. J. K. B. 587; 126 L. T. 659; 86 J. P. 105; 66 S. J. 317, 335; 38 T. L. R. 343; 27 Cox C. C. 178; 16 Cr. App. R. 94, 101; *c.q.*; T. H. HARRY, 21 Cr. App. R. 21: 1928; *c.q.*; and COUNTER, 23 Cr. App. R. 22: 1931; *c.q.*

W. H. Williams, for the Crown, was not called upon.

AVORY, J.: This appellant, having pleaded guilty to receiving, and not guilty to housebreaking, was tried and convicted on that charge, and he also pleaded guilty to receiving on another indictment. He was then put on trial as a habitual criminal, and his counsel has invited the Court to say that there were irregularities in the trial. It is true that objection was taken during the course of the proceedings that the statutory notice did not include the fact that the appellant had absconded from work which had been obtained for him, and had within a few days after other employment had been obtained for him stolen from his fellow workers; and there was nothing in the notice about his absconding from a training ship. It is in some cases difficult as the Act allows evidence " of repute " which is

1931.
14 *December.*

PERCY HERBERT.

Avory, J., Hawke, J., Humphreys, J.

not bound by the strict laws of evidence—to decide whether the evidence has gone beyond the notice. We will assume that there was some evidence given in the list which went beyond that notice. Assuming that, on the evidence which strictly followed the line of the notice, the jury must have inevitably come to the conclusion that the accused was living a criminal life. It is unnecessary to refer to authorities on this question. It has been decided that if this Court decides that the jury would have come to the same conclusion if irregularities had not occurred, no injustice has been done. There was nothing introduced into this case outside the terms of the notice which could have affected the minds of the jury when they had a record of this man's convictions, and bore in mind the few weeks that had elapsed since he came out of prison before he committed a fresh crime. The summing-up is not a full direction, but it correctly states what the jury had to decide. Departures have, in fact, been made from the notice, but they cannot have altered the result. The Court will not, therefore, interfere.

Appeal dismissed.

E. B. A.

BEFORE

MR. JUSTICE AVORY, MR. JUSTICE HAWKE AND MR. JUSTICE HUMPHREYS.

LEON TAUMAN.

1931.
15 *December.*

Habitual Criminal—Preventive Detention Set Aside but Conviction Not Quashed—Evidence of Attempts to obtain Employment—Many Previous Convictions—First Sentence to Penal Servitude.

Severity of sentence to preventive detention.

Although the primary sentence stands, the Court may exceptionally allow it to run from the date of conviction when it quashes a sentence of preventive detention.

1931.
15 *December.*

LEON TAUMAN.

Avory, J., Hawke, J., Humphreys, J.

Appeal against sentence and application for leave to appeal against conviction of being a habitual criminal.

Appellant was convicted, with others, on October 29, 1931, before the Recorder at Croydon Borough Sessions, of shopbreaking, and was sentenced to three years' penal servitude. He was also found to be a habitual criminal, and was sentenced to five years' preventive detention.

Appellant, in person, said that he tried hard, on coming out of prison in January, to obtain work, but in April was convicted again, and on appeal the sentence was quashed. [See p. 44 above.] This put him back and made it harder still for him.

G. B. McClure, for the Crown:

The conviction that was quashed was for conspiracy. The evidence dealt with a number of convictions, and evidence was fully given of his attempts to find work, and the work he had done.

HAWKE, J.: In this case the appellant was convicted of shopbreaking, and sentenced to three years' penal servitude, and also of being a habitual criminal, and sentenced to five years' preventive detention. There was evidence before the Recorder that he had made efforts since his last release to lead an honest life, and on the other hand that he had been seen consorting with thieves and criminals; some of this evidence he denies and some explains. There is no fault in the summing-up. The conclusion of the Court is that this case is exceptional. He has made some effort to lead an honest life, and it may be due to his conviction and release on appeal that he had not the opportunity of making good. The Court has power, under the Prevention of Crime Act, 1908 (8 Edw. 7, c. 59), s. 11, to set aside the order for preventive detention after sentence. One reason for doing so in this case is that although he has again and again been

convicted, no sentence of penal servitude has before this been passed upon him. The sentence of three years stands, but the appeal against preventive detention succeeds. In view of the fact that the sentence has been qualified, the penal servitude runs from the date of conviction.

Sentence of preventive detention set aside.

1931.
15 *December.*

LEON TAUMAN.

Avory, J., Hawke, J., Humphreys, J.

E. B. A.

Solicitors for the Crown : Wontner & Sons.

JACK PHILLIPS.

1931.
15 *December.*

JACK PHILLIPS.

Avory, J., Hawke, J., Humphreys, J.

Breach of Recognisance by Commission of Crime—Sentence for Earlier Offence.

Mitigation of sentence in view of a period of honest work.

Appeal against sentence.

Appellant was convicted on November 5, 1931, before the Chairman of the London County Sessions, of larceny, and was sentenced to eighteen months' hard labour.

Appellant, in person.

The Crown was not represented.

HUMPHREYS, J. : This man pleaded guilty on February 18, 1930, at the London Sessions, before the late Chairman, Sir Robert Wallace, K.C., to the offence of stealing a suit case. Evidence was given of several previous convictions, but he had tried to earn an honest livelihood in the interval. The Chairman therefore postponed sentence for three months, and said that if the report was not good he would sentence him to eighteen months' imprisonment with hard labour. Appellant was released, and would have come up in three months' time for sentence, but at that

1931.
15 *December.*

JACK PHILLIPS.

Avory, J., Hawke, J., Humphreys, J.

time his Probation Officer reported that he was at sea, and the case was adjourned. On his return on September 9, 1930, a report was made to the Chairman that he was at work and was going to remain at sea and that his ship discharges were all marked "very good." He was released and remained at sea till June, 1931. On October 7, 1931, he was arrested for stealing an overcoat from a car, and was sentenced to three months' imprisonment with hard labour. He was then brought up before the present Chairman of the London County Sessions for a breach of his recognisance to come up for judgment for the offence of February, 1930. Having regard to what had been said by Sir Robert Wallace, that is, that if he had a bad report he would sentence him to eighteen months' imprisonment, the Chairman passed that sentence upon him, and on November 5, 1931, he was so sentenced for the larceny committed in February, 1930. This Court regards a breach of recognisance as a serious matter, but as for one year and seven months out of two years there was no complaint against him, and he did his best to lead an honest life, it reduces the eighteen months to six months, to run concurrently with the three months which he is now serving.

Sentence reduced.

E. B. A.

1931.
15 *December.*

WILLIAM WRIGHT.

Avory, J., Hawke, J., Humphreys, J.

WILLIAM WRIGHT.

Registration of Business Names Act, 1916 (6 & 7 *Geo.* 5, *c.* 58).

Whether registration as a military officer by a person who has no claim to that title is an offence under the Registration of Business Names Act, *quære*.

Appeal against conviction.

Appellant was convicted at Derby Assizes on October 22, 1931, after a two days' trial, for obtaining money by false

pretences, and was sentenced by Commissioner M. Healy, K.C., to four months' imprisonment in the Second Division.

1931.
15 *December.*

WILLIAM WRIGHT.

Avory, J., Hawke, J., Humphreys, J

A. M. Lyons, for the appellant (under section 10 of the Criminal Appeal Act, 1907), who was present:

Appellant had been in business as a general dealer. He had registered himself under the Registration of Business Names Act, 1916, 6 & 7 Geo. 5, c. 58, as Lieutenant-Colonel McAlister, and his address as "The Manor House." He kept a number of dogs, and had advertised for sale a litter of Great Danes, saying that they were in splendid condition, nine weeks old, and that a pedigree would be supplied with each. He was accused of false pretences in the sale of one of these puppies, who was a mongrel of no known breed, full of lice and with no pedigree.

Under the Business Names Act a man who has registered is entitled to carry on business in the name under which he has registered. He must give his own name on any show cards or circulars; but in this case there were no show cards or circulars. There was no sufficient evidence that he knew the dog was not a Great Dane. The whole of the advertisement was merely puffing.

Douglas Jenkins, for the Crown, was not called upon.

AVORY, J.: The question which was so much discussed in this case, whether a person under the Business Names Act is entitled to register himself as a Lieutenant-Colonel in the Army when he is not even a private, may require consideration in the proper quarter. It cannot be suggested that because he has registered himself as Lieutenant-Colonel McAlister that he is therefore entitled to obtain money by the false pretence that he is in fact a Lieutenant-Colonel if he does that with intent to defraud.

Appeal dismissed.

E. B. A.

1931.
15 *December.*

HERBERT JOHN SPELLEN.

HERBERT JOHN SPELLEN.

Avory, J., Hawke, J., Humphreys, J.

Extension of Time for Appeal—Joint Defendants—Discrimination in Sentences—Term Running from Date of Conviction.

A summing-up need not include a reading of the whole of defendant's evidence.

Severity of sentence in the case of a subordinate acting under orders.

See p. 105 above.

Appeal against conviction and application for leave to appeal against sentence.

Appellant was convicted of conspiracy to defraud and for obtaining by false pretences at the Central Criminal Court on July 8, 1931, and was sentenced by the learned Commissioner to eighteen months' imprisonment with hard labour.

John Flowers, K.C. (with him *F. F. Atkins*), for the appellant, who was present:

The trial was unsatisfactory in that, as it was very complicated and lasted thirteen days, and an enormous amount of prejudice was produced into the evidence against others of those conspiring, the jury should have been directed to differentiate between those who were actively in participation, and the others. Appellant was only a servant, and unless there was clear and definite evidence that he knew of the frauds the attention of the jury should have been directed to the subject. The learned judge made only one short remark on appellant's evidence, and though he offered to read it to the jury, did not do so.

J. E. Singleton, K.C. (with him *L. A. Byrne*), for the Crown, was not called upon to argue.

AVORY, J.: This appellant was charged with two other persons, named Newbery and Elman, before Mr. Commissioner Gregory on an indictment charging that he was a party

1931.
15 *December.*

HERBERT JOHN SPELLEN.

Avory, J.
Hawke, J.,
Humphreys, J.

with those persons and others to a conspiracy to defraud the public by inducing them to buy worthless shares. On November 17 last, appeals came before this Court made on behalf of Newbery and Elman [p. 105 above], and it is, no doubt, solely in consequence of the fact that this Court, after a very careful consideration of the case, came to the conclusion that the conviction of Newbery and Elman could not be supported on the ground of the defective nature of the summing-up in their cases, that this application has been made on behalf of this appellant. On the evidence given and on his own admissions, the jury may very well have come to the conclusion that he could not have been assisting in the way he did in this business without knowing perfectly well its fraudulent nature. That is the essential difference between his case and the cases of Newbery and Elman. In the present case criticisms have been directed to the summing-up, chiefly on the ground that the learned Commissioner did not in fact read through the evidence which had been given by the appellant. We are satisfied that as he said that he would read it if the jury wished it, and he fairly stated the effect of the evidence which had been given by the appellant, the jury must have indicated that they did not want it read. We are satisfied that no miscarriage of justice occurred from the whole of the evidence of Spellen not having been read, and we think that this appeal must be dismissed.

As regards sentence, the Court is influenced by the fact that Elman, who was the solicitor and who was convicted before the learned Commissioner, was sentenced only to twelve months' imprisonment, and although his appeal has been allowed, we think that we must take into consideration the view formed by the learned Commissioner at the time, and bearing in mind that this appellant was, no doubt, under the direction and domination of others, we think that the term might properly be reduced to one of twelve months.

1931.
15 *December.*
HERBERT JOHN SPELLEN.
Avory, J., Hawke, J., Humphreys, J.

Flowers, K.C., pointed out that appellant had already served $5\frac{1}{2}$ months' hard labour, and if sentence did not run from the date of conviction he would serve in all $17\frac{1}{2}$ months.

AVORY, J.: It may run from the date of conviction.

Sentence reduced.

Solicitors for the appellant: Percy Robinson & Co.

E. B. A.

1931.
15 & 16 *Dec.*
BARNETT MOSS.
Avory, J., Hawke, J., Humphreys, J.

BARNETT MOSS.

False Pretences—Intent to Defraud—Non-Direction.

It depends on the circumstances of each case whether a jury must be *expressly* directed that an intent to defraud is an essential ingredient of the offence.

Appeal against conviction.

Appellant was convicted on October 24, 1931, at the Leeds City Sessions, of false pretences, and was sentenced by the Assistant Recorder to twelve months' hard labour.

R. H. Turton, for appellant (under section 10 of the Criminal Appeal Act, 1907), who was present:

This was a case where it was most important that a direction should be given to the jury that, in order to convict, it was necessary for them to have evidence of intent to defraud. Appellant was convicted of false pretences in representing that he was buying clippings for a company, and it was alleged that he presented a card with their name upon it, but there was evidence to show that he was also buying on his own account. It was, therefore, most important that it should be put to the jury

1931.
15 & 16 *Dec.*

BARNETT
MOSS.

Avory, J.,
Hawke, J.,
Humphreys,
J.

that they must be satisfied that he intended by his representation to obtain goods on false pretences. The learned Assistant Recorder did not direct them that intent to defraud was a necessary ingredient in the case. In MORRIS FERGUSON, 9 Cr. App. R., at 115: 1913; *c.q.*, where the summing-up was almost in the same words as in this case, Avory, J., said: "Undoubtedly that direction withdrew from the consideration of the jury the question whether there was an intent to defraud. We do not say that in every summing-up on a charge of false pretences which does not draw attention to this question there is necessarily a misdirection. There are cases where it is impossible that the money could be obtained unless there was an intent to defraud: it may be inferred from the circumstances of the case." This is a case where it was most necessary that the jury should be directed on the intent.

Anthony Hawke, for the Crown:

This is a case where it is not essential that the jury should be directed on intent to defraud, as the evidence before them was that pretences had been made which had induced the prosecutor to part with the goods. Appellant agreed that if he had made any of the pretences alleged in the indictment they were false, and false to his knowledge, and the jury accepted the evidence of the witnesses for the prosecution that appellant had made those pretences. It was a case entirely for the jury, and they were properly directed for such a case: W. R. CARR, 12 Cr. App. R., at 141: 1916, where Darling, J., said: "It is impossible to conceive that the appellant made the false pretence—which it cannot be contended that he did not make—with any other object than that of defrauding the prosecutor. In some cases, no doubt, it is essential that the attention of the jury must be drawn with great care to the necessity of their finding an intent to defraud on the part of the accused person, but this is not one of them." W. SUMMERSKILL, 13 Cr. App. R. 170: 1918;

1931.
15 & 16 *Dec.*

BARNETT
MOSS.

Avory, J.,
Hawke, J.,
Humphreys.
J.

c.q.—a case where a direction on intent to defraud was obviously essential—and DUTT, 8 Cr. App. R. 51: 1912; *c.q.*, are to the same effect. In several more recent cases it had been said that a non-direction on intent to defraud is fatal, but in none of them were the facts recorded. In this case such a direction was not essential, as the issue before the jury was quite clear.

AVORY, J.: The real question in this appeal is whether the evidence was of such a nature that it was sufficient for the jury to find that goods had been obtained by false pretences, to satisfy them in convicting on this indictment. The authorities are quite clear that there may be cases where goods were obtained by representations known to be false to the person making them, when the Court has said the inference is inevitable, and the omission to warn the jury that the intent to defraud must be proved is not a fatal objection. The whole question is whether this case comes within that category or whether, in the circumstances, it was essential for the jury to be told that before convicting they must be satisfied that there was intent to defraud. It is, in fact, obvious that there was no indication at all to the jury that this was necessary. In his summing-up the learned Assistant Recorder says: "To constitute the crime of obtaining goods by false pretences there must be a representation of an existing fact, which, as a matter of fact, is untrue to the knowledge of the person making the representation and which induced the prosecutor to part with his goods. If you are satisfied that this has been done, then the offence is constituted." The circumstances of this case were such as in the opinion of this Court required that the jury should be told that it was essential that the accused should have had an intent to defraud. There is no doubt evidence that he made representations that he was in the employment of the company in question, and in a sense this was true,

1931.
15 & 16 *Dec.*

BARNETT MOSS.

Avory, J., Hawke, J., Humphreys, J.

for he was paid a commission. There is also material for saying that the prosecutor had really treated this as a debt owing by appellant, for there is evidence that he went to the appellant's father and threatened that unless the money was paid there would be a prosecution, and there is evidence of letters between solicitors about this debt before the trial. The Court is therefore of opinion that this is one of those cases where it was essential that there should have been a direction to the jury that they must find intent to defraud. The conviction cannot, therefore, stand, and the appeal is allowed.

Conviction quashed.

E. B. A.

BEFORE

MR. JUSTICE AVORY, MR. JUSTICE HAWKE AND MR. JUSTICE HUMPHREYS.

ROBERT SMITH.

1931.
18 *December.*

Joint Indictments — Shop-breaking — Receiving with Guilty Knowledge—Verdict against the Weight of Evidence.

On the trial of an indictment for breaking and entering and receiving stolen property against more than one defendant, care must be taken to put the defence of each defendant to the jury and to warn them against convicting on mere suspicion of breaking or of possession.

Appeal against sentence and application for leave to appeal against convictions.

Appellant was convicted of shopbreaking at Croydon Borough Sessions on October 24, 1931, and was sentenced by the Recorder to three years' penal servitude. He was also convicted of being a habitual criminal, and sentenced to five years' preventive detention.

1931.
18 *December.*

ROBERT SMITH.

Avory, J.,
Hawke, J.,
Humphreys, J.

A. Highmore King, for appellant (under section 10 of the Criminal Appeal Act, 1907), who was present: Appellant was accused, with four other men, one of whom was Leon Tauman [p. 125 above], of breaking and entering a shop in Norbury and of stealing shirts, socks and other articles. One of the men, Love, was acquitted. Love was caretaker of a yard at Walthamstow containing garages, and lived in a bungalow on the premises. On September 5 Tauman and another man came to the yard and hired a garage. On September 18 an old taxicab was seen outside a shop at Norbury early in the morning, and five men were seen coming out of a shop and entering the taxicab with sacks full of goods. No one was able to identify the men, but a policeman had seen Tauman standing near. Later on the same day that taxicab was driven into the yard at Walthamstow and put into Tauman's garage. On September 19 Tauman and another man came to the yard, and went across to the bungalow, and shortly after appellant came into the yard and went towards the bungalow. Then all four men went into the garage, in which a large part of the stolen goods was found by the police, and stayed some time. As they came out a police car drove into the yard and they all went into the bungalow and locked themselves in. The visit to the garage was disputed by Love and Smith, and the jury believed Love. There was also evidence against Smith that he was wearing new socks said by the owner of the shop to be of the same make and pattern as those stolen, but he also said that these socks could be bought anywhere. It was also alleged against Smith that he tried to tear the manufacturer's stamp off the socks and to make them look worn. [A sock with a hole in it was produced.] All the other men convicted were also wearing the same kind of new socks.

In his summing-up the Recorder pointed out that there was no evidence against Love of breaking, and that he had a good reason for being in the yard. He gave very little

1931.
18 *December.*
ROBERT SMITH.
Avory, J., Hawke, J., Humphreys, J.

attention to the reason given by appellant, that he was there to inquire about a pitch for a stall, though this was confirmed by an independent and respectable witness, a Mr. Bishop, who said that he had promised to help him by stocking a stall if appellant could find a pitch. Appellant's case was put to the jury as if his story rested entirely on the evidence of Love. There was also very strong emphasis laid on the point of the socks. [He was stopped.]

G. B. McClure, for the Crown, was called upon to argue only on the point whether there was any evidence that appellant was ever in possession of the stolen property. He pointed out that in two respects appellant's case differed from that of Love—in regard to the socks, and as to Love's right to be in the yard. Appellant made his position difficult by disagreeing with every point put forward by the police, and the jury were entitled to believe Love and not to believe him. The hole in the sock was not due to a tear as it was in the instep of the foot, and perhaps was made to make the sock look old. The whole of his evidence made the jury decide that nothing that he said could be accepted.

AVORY, J.: In this case we have come to the conclusion that although there were grounds for suspicion that he was party to receiving the stolen property, knowing it to be stolen, there is no sufficient evidence to support the verdict. It is admitted that there is no evidence that he was a party to the actual breaking and entering. The whole question before the jury was whether he had received any of the goods knowing them to have been stolen. There was a direct controversy between the appellant and Love on the one side and the police on the other, and Love was acquitted, which shows that the jury must have accepted his evidence. On the other hand there is independent

1931.
18 *December.*

ROBERT SMITH.

Avory, J., Hawke, J., Humphreys, J.

evidence that the appellant was at the yard for a legitimate purpose. A Mr. Bishop, quite an independent and respectable witness, gave evidence that he had offered to assist appellant in putting a stall on the market, and the evidence of Love was that he had come to the yard to be introduced to the proprietor, who had influence in getting him a pitch. There was no reason to doubt that Smith came to the yard that day for that reason, and that he did not come conspiring with others. There was a dispute with the police whether he ever went into the garage—even if he did, that is not sufficient to prove that he was in possession of any stolen property. He might have gone to look; but there is no evidence of possession. Everything rested, therefore, on the identification of the socks. The only identification was that they were made by the same manufacturer as that of the stolen socks, but it was admitted that they might be bought anywhere. As regards the hole in the sock, it is obviously too trivial to allow the jury to bring in a verdict of guilty on such evidence. The evidence is not sufficient to justify the verdict, and the appeal is allowed and the conviction quashed. The conviction of being a habitual criminal, it follows, must also be quashed.

Convictions quashed.

E. B. A.

BEFORE

MR. JUSTICE AVORY, MR. JUSTICE HAWKE AND MR. JUSTICE HUMPHREYS.

1931.
21 *December.*

WILLIAM MOORE.

Verdict—Rider by some of the Jurors—Powers of the Judge.

A judge is entitled to insist on a definite verdict of "Guilty" or "Not Guilty," when the jury finds "Guilty" with qualifying words. A verdict of "Guilty but not responsible for his actions, being under the influence of drink" is not necessarily a verdict of "Not Guilty."

1931.
21 *December.*

WILLIAM MOORE.

Avory, J.,
Hawke, J.,
Humphreys, J.

Appeal against conviction.

Appellant was convicted on November 21, 1931, at the Middlesex Sessions, of inflicting grievous bodily harm, and was sentenced by the Chairman to twenty months' imprisonment with hard labour.

Albert Crew, for the appellant (under section 10 of the Criminal Appeal Act, 1907), who was present: The verdict was bad because it was ambiguous and uncertain, and was the opinion of the foreman alone, not the considered verdict of all the jurors. When asked for the verdict, the foreman said: "We find him guilty, but not responsible for his actions, being under the influence of drink." He was told by the Chairman that the verdict must be guilty or not guilty, and he replied: "He is guilty of assault, but he was in drink and did not know what he was doing. Four gentlemen of the jury put that forward." The Chairman then said: "I cannot take that verdict. Either he did not know what he was doing, and he is an innocent man, or he is guilty." The foreman said, without consulting the rest of the jury, "The verdict is guilty." The Chairman: "Without qualification?" The foreman: "Yes." The usual question, "Is that the verdict of you all?" was not added. As a doubt existed, the omission is significant. The verdict, if it means anything at all, means not guilty. He referred to the headnote in HUNT, 13 Cr. App. Rep. 157: 1918: "When the Court thinks that it is doubtful whether the jury intended to answer the specific question, 'Was there an intent to defraud?' in the affirmative, it will quash the conviction." In HUTCHINSON, 7 Cr. App. Rep. 19: 1911, the headnote says: "Where part of the finding of a jury is not clear in law, though another part of the finding is an acquittal on certain counts, the judge is entitled to direct them to reconsider their verdict." In this case the learned Chairman did not direct them to reconsider their verdict.

1931.
21 *December.*

WILLIAM MOORE.

Avory, J., Hawke, J., Humphreys, J.

Counsel also mentioned CRISP, 7 Cr. App. Rep. 173: 1912.

[AVORY, J.: We must take it that the jury conferred again.]

In CHARLTON, 6 Cr. App. Rep., at p. 120: 1911, Avory, J., said: "It has been contended that the verdict in this case cannot stand as a verdict of guilty, that it is unreasonable and repugnant. If a verdict is on its face inconsistent, this Court can refuse to allow it to stand." In this case the verdict is unreasonable and repugnant. The verdict means not guilty. In MEADE, 1909, 1 K. B. 895; 73 J. P. 192; 53 S. J. 378; 2 Cr. App. Rep. 47, Darling, J., says: "A man is taken to intend the natural consequences of his acts. This presumption may be rebutted (1) in the case of a sober man in many ways; (2) it may also be rebutted in the case of a man who is drunk, by showing his mind to have been so affected by the drink he had taken that he was incapable of knowing that what he was doing was dangerous, *i.e.*, likely to inflict serious injury." The verdict is ambiguous, unreasonable and repugnant, and means not guilty.

F. D. Levy, for the Crown, was not called upon.

AVORY, J.: This appellant was convicted on an indictment which charged him with maliciously inflicting grievous bodily harm on a policeman and with assaulting him. When he was arraigned, he said in the first instance, "Guilty, but unconscious of any act"; then he said, "Not guilty of malicious wounding"; and, thirdly, "I was too drunk, I knew no more than the dead." A plea of not guilty was therefore entered, and the case was tried. On the evidence appellant was found in a state more or less drunk fighting in the street, and on being told to go away, he refused, using horrible language. When taken into custody he and the policeman fell to the ground together. Another police officer arrived and took the other man into custody, and all four struggled together.

1931.
21 *December.*

WILLIAM MOORE.

Avory, J.,
Hawke, J.,
Humphreys, J.

A police officer took hold of appellant's leg to restrain him from kicking, and appellant deliberately kicked the police constable on the nose, which was broken, and he was off duty for a considerable time. At the time when he gave that kick, there is no dispute that he meant to kick him, and knew that he was kicking him in the face, for he said, " Take that." After the injury, one of the constables picked up a bottle of whisky which had fallen from the appellant's pocket, and the appellant said, " You are not going to have that whisky." It is therefore obvious that he knew what he was doing and what other people were doing.

In these circumstances the case was summed up to the jury, and the only matter for regret is that the learned Chairman does not appear ever to have warned the jury that a man may be guilty of crime even when he is under the influence of drink, and he may commit an act when drunk which he would not do when sober. He pointed out the excuse made by appellant and what he said when he kicked the policeman. Upon the verdict being taken there was, no doubt, some difficulty. The jury, by their foreman, said : " We find him guilty, but not responsible for his actions, being under the influence of drink." Obviously, that of itself did not amount to a verdict of not guilty. That mere fact, that he was under the influence of drink, does not make him in law not responsible for his actions. It seems clear from the answers of the foreman that four members thought that he was under the influence of drink. Then learned counsel says there is no evidence that the jury in fact conferred together. The Court must assume that they did, because the foreman said, " They are all (including the four) agreed." The Court must take it that after consideration the jury found this appellant guilty. None of the cases cited really governs the present one. It was in the result a clear and unambiguous verdict.

Appeal dismissed.

E. B. A.

1931.
21 *December.*

ALFRED SOANES.

ALFRED SOANES.

Avory, J.,
Hawke, J.,
Humphreys, J.

Sentence reduced in view of other disciplinary action.

Appeal against sentence.

Appellant was convicted at the Middlesex Sessions on November 21 of larceny, and was sentenced by the Chairman to eighteen months' imprisonment with hard labour.

The prisoner was unrepresented and was present.

HAWKE, J.: This man was convicted on two charges of stealing motor cars, and his previous conduct has not been satisfactory. But although his conduct has not been satisfactory, at one time he had a good character as a soldier, and although he has now deserted, there were circumstances in his favour, *i.e.*, his mother had died, and he got permission to try to see her before she died, but did not return. All circumstances being taken into account, his regimental officer says that the Army does not want him back now except to deal with him as a deserter. It is quite apparent that when he has served this sentence he will have to face being tried as a deserter.

Having regard to that, and as he is only twenty-one, the Court hopes that some modification may give him a chance in life. They therefore vary the sentence to nine months' hard labour from the date of conviction.

Sentence reduced.

E. B. A.

1931.
21 *December.*

WILLIAM HARDING.
HARRY HOLT TURNER.
FRANK WILLIAM KING.

WILLIAM HARDING.
HARRY HOLT TURNER.
FRANK WILLIAM KING.

Avory, J.,
Hawke, J.,
Humphreys, J.

Christmas Vacation—Bail.

The interval of the Christmas vacation before an appeal can be heard may be a ground for the Court's granting bail: E. V. CHARAVANMUTTU, 21 Cr. App. R. 184: 1929, followed (*a*).

Applications for bail.

Applicants (none of whom was present) were convicted—Harding (with others) at the Central Criminal Court on November 30 of warehouse-breaking, and sentenced by the learned Commissioner to twelve months' imprisonment with hard labour; Turner at Birmingham City Sessions on November 28 of obtaining money by false pretences, and was sentenced to eight months' imprisonment in the second division; and King at the Central Criminal Court on December 10 of being under the influence of drink while in charge of a motor car, and was sentenced by the Recorder to six months' imprisonment in the second division.

Harding was on bail before his trial on a surety of £100 and his own recognisance of £100. He now offered two sureties of that amount and his own recognisance as hitherto, which the Court accepted, the recognisances to be entered into in the usual way before a magistrate to the satisfaction of the police.

Bail allowed.

Ashe Lincoln, for Turner:

He has always had a good character, and till his trial he was on bail with two sureties of £50 each: he offers

(*a*) But cf. 17 Cr. App. R. 148: 1923, and 20 Cr. App. R. 67: 1927.

1931.
21 *December.*

WILLIAM HARDING.
HARRY HOLT TURNER.
FRANK WILLIAM KING.

Avory, J.,
Hawke, J.,
Humphreys, J.

these two, and (if necessary) a third of £250. The Court granted bail by two sureties of £250 and applicant's own recognisance of £100, the police to be satisfied. His wife not being a householder and having no occupation, not to be a surety.

Bail allowed.

King was allowed bail by two sureties of £100 each and his own recognisance of £100, on the usual conditions.

Bail allowed.

Solicitors—Edge & Ellison, Birmingham, for Turner.

E. B. A.

BEFORE

MR. JUSTICE AVORY, MR. JUSTICE TALBOT AND MR. JUSTICE HAWKE.

ALAN JOHN EIDINOW.

1932.
25 *January.*

Defendant Witness—Cross Examination—Form of Question—Answer imputing untruthfulness to Witness for the Prosecution—Withdrawal of Answer.

Questions ought not to be put in cross-examination to a prisoner in such a form as may involve him inadvertently in an attack on the character of a witness for the Crown.

A threat to a prisoner-witness that his character may be disclosed as the result of his not withdrawing an imputation on the truthfulness of a witness for the Crown, which leads to such withdrawal is, in effect, preventing his defence being put to the jury.

Appeal against conviction.

Appellant was convicted at Middlesex Sessions on November 21, 1931, of fraudulent conversion and was sentenced by the Acting Deputy-Chairman to ten months' imprisonment with hard labour.

W. B. Frampton (under section 10 of the Criminal Appeal Act, 1907), for appellant, who was present:

The case for the Crown was that the appellant cashed a cheque received by him for or on account of Catherine Davison and kept the proceeds. The case for the defence was that he had handed the cheque to a Mr. Earle for the purpose of getting it cashed and had received £8 10s. as a loan from a Mr. Earle or his wife to the appellant's wife, and that that sum was not part of the proceeds of the cheque. The substantial ground of appeal is that appellant was cross-examined in an improper manner. [He read the passage in appellant's cross-examination set out in the judgment and was stopped.]

1932.
25 *January.*

ALAN JOHN EIDINOW.

Avory, J.,
Talbot, J.,
Hawke, J.

Bickmore, for the Crown:

The cross-examination referred to was permissible, on the ground that the nature and conduct of the defence was the suggestion that Earle had committed the offence with which the prisoner was charged and had improperly kept the proceeds of the cheque. There was an attack on Earle's conduct outside his evidence. Appellant was not unduly pressed or trapped into making allegations against Earle. Counsel cited J. PRESTON, 1909, 1 K. B. 568; 78 L. J. K. B. 335; 100 L. T. 303; 73 J. P. 173; 53 S. J. 322; 21 Cox C. C. 773; 25 T. L. R. 280; 2 Cr. App. R. 24: *c.q.* KATE MARSHALL, 63 J. P. 36: 1899; B. HUDSON, 1912, 2 K. B. 464; 81 L. J. K. B. 861; 107 L. T. 31; 76 J. P. 421; 23 Cox C. C. 61; 56 S. J. 574; 28 T. L. R. 459; 7 Cr. App. R. 256, reviewing previous cases.

AVORY, J. (*a*): This appellant, Alan John Eidinow, was charged at the Middlesex Sessions with having between September 16 and October 1 fraudulently converted to his own use the sum of £10, the proceeds of a cheque received by him for or on account of Catharine Davidson. He was found guilty and sentenced to ten months' hard labour. He applied for leave to appeal against his conviction; that leave was granted to him by Mr. Justice Swift, and the leave was granted solely upon the ground that the Court should consider whether the proceedings at the trial were such as to have led in this case to a miscarriage of justice. The appellant's answer to the charge of fraudulent conversion of this cheque for £10 was that he had handed it to a witness named Earle, and that he had handed it to Earle for the purpose of getting it cashed. Whether Earle was to give him the full amount or not is not clear.

The appellant's case was that Earle in fact had not

(*a*) This judgment is printed from a transcript supplied by the courtesy of the Clerk of the Peace for Middlesex.

1932.
25 *January.*

ALAN JOHN EIDINOW.

Avory, J., Talbot, J., Hawke, J.

handed the money, the proceeds of this cheque, to him. He admitted that certain payments had been made by Earle or by Mrs. Earle to his, the appellant's wife, but he said they were not part of the money, the proceeds of this cheque, but were gifts which were made in consequence of the friendship that existed between the parties. In the course of his evidence, in fact at the conclusion of his evidence in chief, he said that he had not received this money from Earle. Thereupon he was cross-examined. He was asked: "Are you on good terms with Mr. Earle?" and "Very good terms" was the answer. "(Q.) Is there any reason why he should give untrue accounts in this case? (A.) I have my own reason." Then the question was repeated: "Are there any reasons you can suggest why he should give untrue accounts? (A.) If you will allow me to suggest them, I will." Then he added, "May I say I am under the impression, my Lord, and members of the jury," and he was promptly corrected and told: "You are not addressing them; you are answering my questions," and his answer was: "I am under the impression the cheque was paid in and Mr. Earle had paid out against that £10. (Q.) Are you suggesting Mr. Earle has used that £10 for himself? (A.) Yes." Then comes this observation made to him by learned counsel: "You had better be very careful what you are doing in making any such suggestions as that against a witness, otherwise it will be the worse for you, I tell you straightly. Are you now prepared to say that Mr. Earle has used that money for his own purposes? (A.) I do." Then the Chairman says: "I suppose you do not realise the serious consequences that may happen to you. If an application is made to me, I shall have to grant it." Well, nowadays juries know a good deal about this matter, and so up to that point the jury must certainly have had the idea that if this man persisted in saying that Earle had kept the money or had not paid it over, they were going to hear something about his previous character. Then learned

1932.
25 *January.*

ALAN JOHN EIDINOW.

Avory, J.,
Talbot, J.,
Hawke, J.

counsel said to the Chairman: "I am going to make that application to you, sir," and then to the witness: "You are attacking Mr. Earle as an honest witness in this case and telling us that what he has done is to come here and give perjured evidence. That is what you are suggesting against him." Then the witness made a very proper answer; he said: "Excuse me. You asked me. . ." (Mr. Bickmore.) "Do you put yourself up here as a man of character whose word is to be accepted?" Then Mr. Frampton, counsel appearing for him, said: "He was not going on with that reason before my friend pressed him for it," and the Chairman said: "He has made a distinct charge against Mr. Earle of improperly using moneys received from the cheque for his own purposes. That is a very serious charge." (Mr. Frampton.) "He said he thought the money had been drawn out." Then the Chairman repeats: "He made a very serious accusation against Mr. Earle," and, finally, the learned counsel said to him: "Do you still say you are prepared to make those allegations against Mr. Earle? (A.) If I may be allowed . ." the witness began, but he was not allowed to finish. (Mr. Bickmore.) "I want an answer, not a speech. Are you going to withdraw those accusations or to make them? You are on your oath, and you stand before the jury. If you withdraw them, they will understand how much truth there is in what you say. You assert them and you take the consequences. What are you going to do? (The Chairman.) You must decide what you are going to do. (A.) My Lord, those were my own personal thoughts. (The Chairman.) Never mind, you made that charge. Mr. Earle is a respectable trader who seems, from the evidence before this Court, to have been exceedingly kind to you and your wife, and to make such a charge is something which cannot be permitted. You either say you stand by what you have said or withdraw, one or the other. Which do you do?" and the answer was: "I am compelled to withdraw." Then learned counsel said to him: "Then

1932.
25 *January.*

ALAN JOHN EIDINOW.

Avory, J.,
Talbot, J.,
Hawke, J.

the jury will judge for itself how much truth there is in any evidence which you have given to them."

It is obvious that in those circumstances the accused was placed in this dilemma: Having been asked, in effect, "What is your answer to this charge?" he said, "My answer is that I never received the money and as I never received it Earle must have kept it." Then he is told: "If that is your defence, then you are making an imputation on Mr. Earle, a witness for the prosecution, and unless you withdraw it, I shall let the jury know about your previous character." That is what it comes to. Thereupon the man, after being threatened by the Chairman in the way I have just read, says: "I withdraw it," and having withdrawn it, he is then told, or the jury are told in his presence, "You cannot believe a word he says." Then on the following page he is again asked about Mrs. Davidson, who had entrusted the cheque to him and who, he said, owed him money: "Do you know that Mrs. Davidson has said that she owes you no money? (A.) I do. (Q.) You say that Mrs. Davidson in saying that is speaking untruly in the witness-box. Be careful. You are a man of business, are you not? (A.) I am." Then the Chairman said: "That is another question which you must be very careful how you answer." In other words, this man is being told, "If you say that either of these witnesses is not speaking the truth, then consequences may follow; the jury will be told about your previous character." In these circumstances we are of opinion that the defence which this man wished to put forward was, in effect, withdrawn from the jury by their being told beforehand that the witness for the prosecution is a perfectly respectable witness whose evidence they should accept, while the accused is a man of bad character whose evidence they cannot accept.

That appears to be the effect of the proceedings at this trial, and that being the effect, in the opinion of this Court it is impossible to say that there was not a miscarriage of

1932.
25 *January.*

ALAN JOHN EIDINOW.

Avory, J., Talbot, J., Hawke, J.

justice, whatever other evidence there may have been in the case. In those circumstances, while acquitting learned counsel of any intention to entrap this man, it is important, perhaps, to quote a passage from the latest case on this subject, of WILLIAM BALDWIN, reported in the eighteenth Volume of the Criminal Appeal Reports, at p. 178 (*b*), where the Lord Chief Justice said: "It cannot be right for learned counsel for the Crown to ask questions for the purpose of eliciting answers which may be of such a kind as to involve the accused person inadvertently in the mischief provided for"—in the latter part of the section of the statute.

Under those circumstances, we think the trial was so unsatisfactory that the verdict cannot be allowed to stand, and the appeal, accordingly, will be allowed and the conviction quashed.

Conviction quashed.

T. R. F. B.

The Court (Avory, Talbot and Macnaghten, JJ.) also sat on January 18.

1932.
25 *January.*

JACOBUS PETERS VAN DYN.

Avory, J., Talbot, J., Hawke, J.

JACOBUS PETERS VAN DYN.

Notice of Appeal—Withdrawal—Leave to Renew Appeal.

Only in special circumstances will the Court allow the abandonment of a withdrawal of a notice of appeal.

Application for leave to withdraw notice of abandonment of appeal against conviction and to call witnesses.

Applicant was convicted at the Central Criminal Court on June 25, 1931, of wounding with intent to do grievous bodily harm, and was sentenced by the Recorder to seven years' penal servitude.

Hector Hughes, for the applicant, who was not in custody:

On July 2, when in Wandsworth Prison, applicant signed

(*b*) 133 L. T. 191; 89 J. P. 116; 28 Cox C. C. 17: 1925: *c.q.*

1932.
25 *January.*

JACOBUS PETERS VAN DYN.

Avory, J., Talbot, J., Hawke, J.

a notice applying for leave to appeal and to call further evidence. He abandoned his application on the receipt of a letter from one of the witnesses whom he desired to call, who stated that if she gave evidence she would lose her post and her mother would go mad. On December 3 he was discharged from Dartmoor Prison, the remainder of his sentence having been remitted on the recommendation of the Home Secretary. His solicitors were not able to obtain the evidence on which the Home Secretary had acted in ordering his release. It is submitted, however, that his release indicates that, in the opinion of the Home Secretary, he was not guilty, and it would be contrary to natural justice to preclude applicant from the opportunity of clearing himself by having his appeal heard. Moreover, further evidence is now available, which he could not have produced at the trial, and the appeal was abandoned for entirely inadequate reasons, especially in view of the fact that he is a foreigner unacquainted with the legal system of this country. [Counsel cited C. R. BARKER, 5 Cr. App. R. 283: 1910, and J. J. SCOTT, 18 Cr. App. R. 10: 1924, and dealt briefly with the summing-up.]

No counsel appeared for the Crown.

AVORY, J.: Rule 23 of the Criminal Appeal Rules, which have the force of statute, provides that, where notice of the abandonment of an appeal has been given, the appeal shall be deemed to have been dismissed. That was made clear on the form of the notice which this applicant had to sign.

There has been no question of any free pardon to this applicant. The Home Secretary's recommendation was merely that the remainder of his sentence should be remitted, the applicant at that time having served about six months' imprisonment. A reason for that remission has been suggested by counsel—namely, that the Recorder appears to have been influenced in passing sentence by statements made by a police-officer with regard to the

1932.
25 *January.*

JACOBUS PETERS VAN DYN.

Avory, J., Talbot, J., Hawke, J.

applicant's character and mode of life and previous convictions.

The reason given by the applicant for the abandonment of his appeal (which was not against sentence) is so frivolous that it must be untrue, since the person whom he wished to call as a witness had been fully examined both at the police court and at the trial of the applicant.

The only cases in which the Court has granted an application such as the present were cases in which notice of abandonment was given under some misapprehension or some mistake of fact. In S. PITMAN, 12 Cr. App. R. 14: 1916, Reading, L.C.J., said that the Court would allow abandonment only " where there are special circumstances (*a*) which in the view of the Court justify a departure from the ordinary procedure. . . . It must be borne in mind that precautions are taken to bring to the notice of every prisoner that he has a right to appeal against his conviction and sentence, and that he does not require money to enable him to do so. There can be no justification for an accused person abandoning his appeal unless he thinks that there is no ground on which to appeal, and that it would be useless for him so to do." In the present case there is no ground for saying that the notice was given under any misapprehension or mistake of fact. In these circumstances it is quite unnecessary to enter into the merits of the applicant's case. The Court sees no ground for allowing the notice of abandonment, which was formally signed by the applicant, to be withdrawn. The notice operates as the dismissal of the appeal, and the appeal accordingly stands dismissed.

Application dismissed.

Solicitors—Edmond O'Connor & Co., for applicant.

(*a*) In SLOAN AND WADDINGTON, 87 J. P. 56; 39 T. L. R. 173; 67 S. J. 403: 1923, Salter, J., said: " It is not desirable or even possible to enunciate in what circumstances " such an application will be granted. " But there must be special circumstances."

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE HUMPHREYS.

GEORGE EDWARD GRIFFITHS.

1932.
8 *February.*

Plea of Guilty—Mistake of Defendant—Severity of Sentence after Previous Convictions.

Despite a plea of guilty, the Court will review a conviction when there is a good defence in law.

The Court does not accept the principle that a sentence must necessarily be severer than that passed on the prisoner on a previous conviction.

A defendant must distinctly consent to the court of trial taking into consideration charges other than those in the indictment before it can do so.

Appeal against one conviction and against sentences by leave of the Court.

Appellant pleaded guilty to office-breaking (two charges) and also to bigamy at Leeds Assizes on November 28, 1931, and was sentenced by McCardie, J., to four years' penal servitude and twelve months' imprisonment with hard labour (concurrent).

R. H. Turton, for appellant (under section 10 of the Criminal Appeal Act, 1907), who was not present:

With regard to the plea of guilty to bigamy, appellant was under a misapprehension with regard to what constituted the offence. There would have been no evidence to support the prosecution if the case had been tried. Not only had the accused made a statement that he *bona fide* believed his wife to be dead, but there was no evidence that he knew her to be alive within the seven years before the second marriage. There is authority for this Court entertaining an appeal against conviction where a plea of

1932.
8 *February.*

GEORGE EDWARD GRIFFITHS.

Hewart, L.C.J., Avory, J., Humphreys, J.

guilty has been made under a misapprehension: INGLESON, 1915, 1 K. B. 572; 84 L. J. K. B. 280; 112 L. T. 313; 24 Cox C. C. 527; 11 Cr. App. R. 21: *c.q.* With regard to the sentence for office-breaking, appellant's longest previous sentence was eighteen months' imprisonment with hard labour in 1924, and his last conviction was in November, 1928. If one may infer from the observations made by the judge in passing sentence, appellant was in effect being sentenced for his previous convictions and for the lenient view which other judges had taken of those cases. Further, the judge said that he was being asked to take into consideration fifteen other cases. Appellant was, however, never asked in Court whether he admitted those offences and whether he desired that they should be taken into consideration. The evidence that he had admitted them was merely hearsay.

E. A. Hawke, for the Crown:

Appellant had the opportunity of asking the officer who gave his record any questions he wished.

THE LORD CHIEF JUSTICE: This trial seems in various respects to have been unfortunate and unsatisfactory. It is true that apparently the appellant, after having had the whole of both indictments put to him, pleaded guilty; but anyone who looks with care at the depositions must perceive that he had a good defence to the charge of bigamy. He married his first wife on April 24, 1919, and they lived together for about six months; then she went to live with her mother, and had not since that time seen the appellant at all. When cross-examining the officer who gave his record, he said, "I did not know I had committed bigamy until I told him (the officer) about it." Here, then, was a case in which the wife had been continually absent from the husband for the space of seven years then last past, and there was no evidence at all that the appellant knew that his first wife was alive within that time. The deposi-

1932.
8 *February.*

GEORGE EDWARD GRIFFITHS.

Hewart, L.C.J., Avory, J., Humphreys, J.

tions are before the Court, and it appears clearly there that the appellant said: "Not guilty, because I thought my first wife was dead." We do not think that any useful purpose will be served by ordering a trial of the charge of bigamy, because there is no evidence upon which the appellant could be convicted. We therefore quash the conviction for bigamy.

I come now to the sentence of four years' penal servitude for the other offences. The offences which the appellant admitted were offences of breaking into two offices and stealing money and property therein. Although we are told that he pleaded guilty to fifteen other offences, the evidence before the Court seems quite ludicrously unsatisfactory. It reads: "*Q.* Have you [an Inspector of the Halifax Borough Police] served a list of other offences upon the prisoner? *A.* I have. *Q.* Did you read them over to him? *A.* No; they were served in prison. *Q.* Did he admit them? *A.* Yes." That must be hearsay. "*Q.* And does he desire them to be taken into consideration? *A.* Yes." That must be hearsay. At no moment was the appellant himself asked in Court whether he desired the offences or any of them to be taken into consideration.

The judge, if he is correctly reported—as he may not have been—permitted himself to say that the record of the appellant "illustrates the unfortunate effect of lenient sentences in the past, not only by magistrates but also by judges, and I think it illustrates, too, the unfortunate effect of unnecessary reductions of sentences by the Court of Criminal Appeal." This Court never reduces a sentence unless the reduction is necessary, and where the reduction is necessary in the interests of justice, this Court is by statute required to reduce it. This sentence of four years' penal servitude, as the remaining observations of the judge show, was evidently based on the view that when a man has previously been convicted a subsequent sentence must of necessity be a heavier sentence, whatever the nature of

1932.
8 *February.*

GEORGE EDWARD GRIFFITHS.

Hewart, L.C.J., Avory, J., Humphreys, J.

the offence may be. This Court has said again and again, and I repeat it now, that a man is not to be twice punished for the same offence, and it does not in the least follow that a subsequent sentence must be heavier than the sentence which preceded it. In the present case it appears from the record that the last previous sentence passed on the appellant was passed on November 21, 1928, at Petty Sessions—a sentence of six months' imprisonment with hard labour for stealing a bicycle—and the most serious sentence which he has received was eighteen months' imprisonment with hard labour in the year 1924.

I prefer to refrain from making any further observations. We are all of opinion that for the offences which alone could properly be considered by the Court the adequate sentence is eighteen months' imprisonment with hard labour, and the sentence of four years' penal servitude is accordingly reduced. The sentence will run from the date on which it was passed.

One conviction quashed.
One sentence reduced.

T. R. F. B.

1932.
8 *February.*

THOMAS DWYER.

Hewart, L.C.J., Avory, J., Humphreys, J.

THOMAS DWYER.

Prisoner in Custody — Interrogation by Police Officer — No Caution—Evidence Inadmissible.

Evidence of conversation between a prisoner in custody and a police officer may not be admissible on the trial of the accused, if the prisoner has not been cautioned.

Appeal against conviction and sentence.

Appellant was convicted at Abingdon Sessions on December 17, 1931, of larceny, and was sentenced by the Recorder to twelve months' imprisonment with hard labour.

1932.
8 *February.*

THOMAS DWYER.

Hewart, L.C.J., Avory, J., Humphreys, J.

S. D. Musson, for appellant (under section 10 of the Criminal Appeal Act, 1907), who was present:

In his summing-up, the Recorder used the expression "even supposing this was the first occasion upon which he came upon his trial." That must have conveyed to the jury the impression that appellant had been previously convicted. Further, the evidence of a police officer was admitted in the following circumstances: During a railway journey when he had appellant in custody, he entered into a conversation with him about the case. No note was taken at the time, and appellant was not cautioned. The Recorder should have refused to admit that evidence. [He was stopped.]

R. G. Micklethwait, for the Crown:

To judge from the context, the observation complained of in the summing-up appears to be due to some error in the transcript. There are circumstances where the evidence of statements by prisoners in custody may be admissible though no caution has been given. [He referred to IBRAHIM, 1914, A. C. 599; 83 L. J. P. C. 185; 111 L. T. 20; 30 T. L. R. 383; 24 Cox C. C. 174, and VOISIN, 1918, 1 K. B. 531; 87 L. J. K. B. 574; 118 L. T. 576; 82 J. P. 96; 34 T. L. R. 269; 62 S. J. 423; 26 Cox C. C. 224; 13 Cr. App. R. 89.] The Recorder was entitled, in the exercise of his discretion, to admit the evidence. The circumstances in which this confession was obtained were not the kind of circumstances at which the judges' rules were aimed. It cannot, however, be contended that, apart from this evidence, the jury would necessarily have convicted.

THE LORD CHIEF JUSTICE: The point of substance in this appeal is that on November 19, 1931, a police officer was conveying the appellant to Oxford Prison, and on the way entered into a conversation with him. The appellant was not cautioned by the officer and no note was made by the officer till two days afterwards. It is important to see

1932.
8 *February.*

THOMAS DWYER.

Hewart, L.C.J., Avory, J., Humphreys, J.

what that conversation was. The officer, in his evidence, said: "I said to him, 'Who is the officer dealing with the case?' He replied, 'I do not know his name, he was rather a little fellow that brought me from Uxbridge.' I said, 'Oh, they found you at Uxbridge, did they? I thought they found you at Reading.' He replied, 'No, we took the car from Reading; we found it in a side street near a picture palace.'" In fairness to the officer, it should be mentioned that he said in cross-examination: "Had I known that I was extracting any further evidence, I should have cautioned him." The result of this conversation between the officer and a prisoner who was in custody and to whom no caution had been given was that very important evidence was obtained.

In the particular circumstances of this case, it seems to us that that questioning was improper, and that the Recorder ought to have excluded the evidence. We think that the evidence was wrongly admitted, and that in the circumstances the conviction was unsatisfactory and ought to be quashed.

Conviction quashed.

T. R. F. B.

KATHLEEN MAY CURTIS.

1932.
8 *February.*

KATHLEEN MAY CURTIS.

Hewart, L.C.J., Avory, J., Humphreys, J.

Concealment of birth—Extenuating Circumstances.

Severity of sentence.

Appeal against sentence.

Appellant pleaded guilty at Buckinghamshire Assizes on January 14, 1932, to concealment of birth, and was sentenced by Horridge, J., to nine months' imprisonment with hard labour, another offence of the same nature being taken into consideration.

1932.
8 *February.*

KATHLEEN MAY CURTIS.

Hewart, L.C.J., Avory, J., Humphreys, J.

T. R. Fitzwalter Butler, for appellant (under section 10 of the Criminal Appeal Act, 1907), who was present:

The sentence was too severe in all the circumstances of the case, and there was an error in principle, in that a sentence of imprisonment in the second division would have been more appropriate, having regard to the nature of the offences and the antecedents of the accused. Appellant is twenty-seven years of age, and, apart from these offences, has never been convicted of or charged with any offence, and her parents are highly respectable. In each case appellant was left alone at the time of her confinement, and soon after the birth of the child was visited by a man with whom she had been on intimate terms and who was the father of the child in the later case. He took no steps to secure the lawful disposition of the dead body and went away leaving the appellant alone with it. His conduct, and his neglect of the appellant at the time of the birth, must in each case have exposed the appellant to a strong temptation to commit the offence. The circumstances of her life had completely changed at the time of her arrest, as she had left this man and returned to live with her parents, who are willing and anxious to look after her.

No counsel appeared for the Crown.

THE LORD CHIEF JUSTICE: The points that can be urged on behalf of the appellant have been very clearly urged by counsel, and we think that this sentence may properly be reduced to a similar term in the second division.

Sentence reduced.

T. R. F. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE FINLAY AND MR. JUSTICE HUMPHREYS.

1932.
15 *February.*

LESLIE THOMAS HANSLOW.

Severity of Sentence on Young Persons.

Appeal against sentence.

Appellant pleaded guilty to larceny at West Riding (Leeds) Sessions on January 11, 1932, and was sentenced by the Chairman to three years' detention in a Borstal institution.

R. T. V. Castle-Miller, for appellant, who was present:

Appellant is eighteen years of age, and the son of respectable parents. He has been three times before the Courts and was last bound over in March, 1931. This offence was clearly one of sudden temptation, and his employer (Mr. Thomas) is prepared to take him back.

E. L. Mallalieu, for the Crown.

Appellant appears to be lacking in discipline, though he has a good character as a workman.

THE LORD CHIEF JUSTICE: The case is very near the line, but the Court has come to the conclusion that a better course than sending this lad to Borstal is to bind him over, a condition of the recognisance being that he be under the supervision of Mr. Thomas.

Sentence reduced.

Solicitors—Collyer, Bristow & Co., agents for Titley & Paver-Crow, Harrogate, for appellant.

T. R. F. B.

LAWRENCE SCHOLES.

1932.
15 *February.*

LAWRENCE SCHOLES.

Hewart, L.C.J., Finlay J., Humphreys, J.

Severity of Sentence on Young Persons.

Appeal against sentence.

Appellant pleaded guilty to housebreaking and larceny at West Riding (Leeds) Sessions on January 11, 1932, and was sentenced by the Chairman to three years' detention in a Borstal institution.

E. R. Guest, for appellant, who was present:

Appellant is seventeen years of age, and has never been previously convicted. He is said to have been led away by other youths. His employment is being kept open for him.

E. L. Mallalieu, for the Crown:

Eight other offences of a similar nature were taken into consideration, but they were all committed within a short space of time.

THE LORD CHIEF JUSTICE: We think that in the circumstances this sentence may be reconsidered, and that this boy may be bound over, the conditions of the recognisance being that he return to Harrogate and be placed under the supervision of the Probation Officer.

Sentence reduced.

Solicitors—Stafford, Clark & Co., agents for Herbert Atkinson, Harrogate, for appellant.

T. R. F. B.

1932.
15 *February.*

ARTHUR TROWBRIDGE.

ARTHUR TROWBRIDGE

Severity of Sentence on Young Persons.

Hewart, L.C.J., Finlay, J., Humphreys, J.

Appeal against sentence.

Appellant pleaded guilty to burglary at Hertfordshire Sessions on January 4, 1932, and was sentenced by the Chairman to three years' detention in a Borstal institution.

Appellant in person:

Mr. Vevy, who is a tailor, is willing to give me employment at once.

No counsel appeared for the Crown.

THE LORD CHIEF JUSTICE: The appellant is nineteen years of age and has never been previously convicted. We think it right to give him, also, another chance, and place him under the instructions of the Probation Officer on the terms that he goes into the employment of Mr. Vevy.

Sentence reduced.

T. R. F. B.

1932
15 *February.*

ROBERT SYDNEY JONES.

ROBERT SYDNEY JONES.

Severity of Sentence on Young Persons.

Hewart, L.C.J., Finlay, J., Humphreys, J.

Appeal against sentence.

Appellant pleaded guilty to shopbreaking, housebreaking and larceny at Carnarvonshire Sessions on January 7, 1932, and was sentenced by the Acting Chairman to three years' detention in a Borstal institution.

Appellant in person:

My employer is willing to give me back my work.

No counsel appeared for the Crown.

1932.
15 *February.*

ROBERT SYDNEY JONES.

Hewart, L.C.J., Finlay, J., Humphreys, J.

THE LORD CHIEF JUSTICE: The appellant is seventeen years of age, and has been previously convicted of damaging fruit trees, of larceny from an automatic machine, and of purchasing intoxicating liquor when under eighteen years of age. His employer writes that, in the event of this boy being released, he is quite prepared to give him another chance. In all the circumstances, we think it right to give him another chance, and place him under the Probation Officer, on the terms that he returns to his employer.

Sentence reduced.

T. R. F. B.

LEON ZEITLIN.

1932.
15 *February.*

LEON ZEITLIN.

Hewart, L.C.J., Finlay, J., Humphreys, J.

Undischarged Bankrupt—Obtaining Credit—Time of Giving Information of Bankruptcy—Bankruptcy Act, 1914 (4 & 5 *Geo. 5, c. 59*), *s.* 155.

If an undischarged bankrupt gives information to a creditor a reasonable time before he obtains credit from him he is not within section 155 of 4 & 5 Geo. 5, c. 59, the Bankruptcy Act, 1914. The information need not necessarily be given at the moment of obtaining the credit.

Appeal against conviction, by leave of the Court.

Appellant was convicted at the Central Criminal Court on January 14, 1932, of obtaining credit without disclosing that he was an undischarged bankrupt, and was sentenced by the Commissioner to four months' imprisonment in the second division.

Roland Oliver, K.C. (*J. P. Valetta* with him), for appellant, who was present, having surrendered to bail:

It was common ground between the prosecution and the defence that appellant was well known to the prosecutor

1932.
15 *February.*

LEON ZEITLIN.

Hewart, L.C.J., Finlay, J., Humphreys, J.

Nathan, as they had been engaged on a series of transactions together. In June, 1929, appellant was entrusted with a quantity of jewellery for the purpose of sale, but he failed to sell it and brought it back to Nathan. Appellant then bought a ring from Nathan on credit. It is not disputed that at that time he was an undischarged bankrupt. The whole question is, Did he inform Nathan of this? The case for the defence was that, during the series of transactions between them, on one or two occasions conversations arose in which his bankruptcy was referred to, and that he told Nathan he would get his discharge in the following November. The case for the Crown was that Nathan never knew that the appellant was a bankrupt. If appellant's version was true, no one could say that he had not informed Nathan that he was an undischarged bankrupt. The judge, in his summing-up, correctly stated the law, but when he came to apply the law to the facts, misdirected the jury. Appellant had in June, 1929, at the time of the purchase of the ring, given Nathan a cheque post-dated to September, 1929, and this seems to have misled the judge into thinking that the transaction took place in September instead of June. He refers to the conversation between appellant and Nathan as having taken place "some time before" the obtaining of the credit, when the evidence was that it had taken place "just before."

E. A. Hawke, for the Crown:

It is not contended that the statute requires that the information should be given on every single occasion on which credit is obtained. It is conceded that it is sufficient if the information is given at a reasonable distance of time from the transaction, so that the information is present in the mind of the creditor. There were other counts in the summing-up, on which appellant was acquitted, and though the direction on this count was somewhat unfortunately worded, the summing-up, read as a whole, gave the jury an adequate direction.

1932.
15 *February.*

LEON ZEITLIN.

Hewart, L.C.J., Finlay, J., Humphreys, J.

THE LORD CHIEF JUSTICE: The summing-up of the learned judge was careful and full in all respects except one. It seems to involve a certain confusion of dates. The charge was that the appellant obtained credit in June, 1929, but he gave a post-dated cheque, and it looks as if the date of the obtaining of the credit and the date of the post-dated cheque had been confused. Certainly the appellant gave evidence that just before the time when he obtained this credit he had a conversation with Nathan which, if it took place, showed clearly that he was an undischarged bankrupt. In those circumstances, if the jury accepted the version of the matter given by the appellant, it was quite clear that the offence had not been committed.

Counsel has directed our attention to various passages in the summing-up, and it is apparent from one passage at any rate that the judge was of opinion that, if about the time of obtaining credit the information was given, that was enough. The statute [4 & 5 Geo. 5, c. 59, the Bankruptcy Act, 1914 (*a*)] does not require that the information should be given at the very moment of obtaining. Unfortunately, there are other passages which convey, or may well have conveyed, a different impression. We have come to the conclusion that, the summing-up being what it is, this appeal must succeed and this conviction must be quashed.

Conviction quashed.

Solicitors—William White & Co., for appellant.

(*a*) By section 155 an undischarged bankrupt who "obtains credit to the extent of ten pounds or upwards from any person without informing that person that he is an undischarged bankrupt . . . shall be guilty of a misdemeanour."

1932.
15 *February.*

ALEXANDER MURRAY.

ALEXANDER MURRAY.

Hewart, L.C.J., Finlay, J., Humphreys, J.

Habitual Criminal—Three Previous Convictions—Convictions in Scotland — Whether Available to Crown — 34 & 35 Vict. c. 112, Prevention of Crimes Act, 1871, s. 20—8 Edw. 7, c. 59, Prevention of Crime Act, 1908, s. 10, sub-s. 2 (a).

A conviction in Scotland of an offence punishable on indictment in Scotland as well as England (if the offence is a " crime " in England within the Schedule to the Prevention of Crime Act, 1908), is available to the Crown as one of the three previous convictions which, under section 10, sub-section 2 (a) of 8 Edw. 7, c. 59, the Prevention of Crime Act, 1908, have to be proved on the allegation that accused is a habitual criminal.

Appeal against conviction as a habitual criminal and against sentence.

Appellant pleaded guilty at the Central Criminal Court on January 18, 1932, to burglary, and was convicted of being a habitual criminal. He was sentenced by the Recorder to three years' penal servitude and five years' preventive detention.

Albert Crew, for appellant (under section 10 of the Criminal Appeal Act, 1907), who was present:

The three statutory convictions were in Scotland, and were not properly proved. They should have been proved as a matter of foreign law. The certificates of the three statutory convictions put in by the Crown were not in accordance with the notice given to appellant and were therefore not admissible. In one case there was a difference with regard to the term of the sentence, and in another case with regard to the date of the conviction. In H. HAYWARD, 137 L. T. 64; 43 T. L. R. 356; 28 Cox C. C. 342; 20 Cr. App. R. 33: 1927, the Court held that, in proving previous convictions (other than the three statutory), it was not obligatory for the Crown to rest upon section 18 of the

1932.
15 *February.*

ALEXANDER MURRAY.

Hewart, L.C.J., Finlay, J., Humphreys, J.

Prevention of Crimes Act, 1871, but in this case, in relying upon the Scottish convictions, the Crown was basing its case on another part of that section. The summing-up did not deal adequately with honest work done by appellant since his last release.

[THE LORD CHIEF JUSTICE: A point was indicated in the court below that convictions in Scotland are not available to the Crown under this Act.]

H. T. Wright, for the Crown:

I have to crave in aid the following paragraph of section 18 of the Prevention of Crimes Act, 1871, 34 & 35 Vict. c. 112: "A previous conviction in any one part of the United Kingdom may be proved against a prisoner in any other part of the United Kingdom; and a conviction before the passing of this Act shall be admissible in the same manner as if it had taken place after the passing thereof."

[FINLAY, J.: There might be an indictable crime in Scotland which does not fall within the Schedule to the Prevention of Crime Act, 1908.]

Perjury would be an example of this, and in that case the Crown would not be entitled to rely on the Scottish conviction. Here all the convictions in Scotland were of offences which fall within the Schedule.

HUMPHREYS, J.: This appellant pleaded guilty at the Central Criminal Court to burglary, and was sentenced to three years' penal servitude. He was also found by the jury to be a habitual criminal and was sentenced to five years' preventive detention. He has sent in two notices of appeal to this Court, in neither of which does he express a desire to be allowed to appeal against the sentence of three years' penal servitude. We have, however, allowed his counsel to address us with regard to that sentence, and we are quite satisfied that it was a perfectly proper one. The first of the two notices of appeal states that the grounds

1932.
15 *February.*

ALEXANDER MURRAY.

Hewart, L.C.J., Finlay, J., Humphreys, J.

of appeal are based on a point of law raised by counsel at the trial. The second notice, which was probably drawn by counsel, puts the matter more regularly. It states that the grounds of appeal are (1) that the statutory convictions which were alleged by the prosecution were not admissible in evidence, and (2) that the three statutory convictions were not proved precisely as specified in the notice given to the appellant under the Prevention of Crime Act, 1908, s. 10, sub-s. 4 (b). To deal, in a word, with the second of those two grounds, it appears to be a fact that, in the notice served by the Director of Public Prosecutions on the appellant stating that it was intended to charge the appellant with being a habitual criminal, one of the grounds included was that the appellant had been convicted at Edinburgh Sheriff Court on July 1, 1924, and sentenced to two years' penal servitude and 522 days' *remanet* of sentence. No one seems to have doubted that that was a perfectly accurate statement, but the certificate which was produced from Edinburgh Sheriff Court merely stated that the sentence was one of two years' penal servitude, and the appellant takes a point that those were inconsistencies which were fatal to the charge. In the opinion of this Court the mere fact that the *remanet* of 522 days does not appear in the certificate of conviction cannot make the notice in the least degree bad. The only point of giving the notice is that the accused may know what is going to be alleged against him. A further point was taken that, as regards the second conviction, there was a mistake in the date. In our view, there is nothing at all in that point.

The other point which was stated in the revised grounds of appeal and which was argued in the court below was as follows: It was contended that the three convictions, which under the Act must be proved strictly in order that a man might be convicted of being a habitual criminal, were convictions which took place in Scotland, and that convictions in Scotland of any character could not be described

1932.
15 *February.*

ALEXANDER MURRAY.

Hewart, L.C.J., Finlay, J., Humphreys, J.

as convictions of " crimes " within the meaning of section 10 of the Prevention of Crime Act, 1908. Section 10, sub-section 6, provides: " For the purposes of this section the expression ' crime ' has the same meaning as in the Prevention of Crimes Act, 1871, and the definition of ' crime ' in that Act, set out in the schedule to this Act, shall apply accordingly." Section 20 of the Act of 1871, so far as England and Ireland are concerned, is repeated in the Schedule to the Act of 1908, but so far as Scotland is concerned, the provisions of the Act of 1871 are omitted from the schedule. The Prevention of Crime Act, 1908, however, by section 17, is made to apply to Scotland with certain exceptions and explanations. By that section, sub-section 2, in the application to Scotland of the provisions of the Act, " crime " used in reference to previous convictions means a crime of which a person has been convicted on indictment. It is quite clear, reading the two Acts together, that a crime which in Scotland is punishable on indictment, if that crime is also a crime within the meaning of the definitions of " crime " in the Act of 1908, is a crime which may be taken into account, and a conviction of that crime in Scotland may form one of the three convictions of a crime referred to in section 10, sub-section 2, in the Act of 1908. The Court does not doubt that, in order that that result may follow, the crime must be an indictable offence in England as well as in Scotland and also one of the crimes referred to in the schedule to the Act of 1908. In this case it is quite clear that no difficulty arises, as the charges here were charges of shopbreaking with intent to steal, housebreaking and larceny, and, again, housebreaking and larceny—all of which are crimes, felonies, in England within the definition, as well as indictable offences in Scotland.

In our view, the point fails, and it was right in this case that the three convictions in Scotland should be treated as the three convictions of a crime for the purpose

1932.
15 *February.*

ALEXANDER MURRAY.

Hewart, L.C.J., Finlay, J. Humphreys, J.

of section 10, sub-section 2 of the Act of 1908, and they were properly referred to and properly proved. Therefore this appeal must be dismissed. Inasmuch, however, as this was a point which the Recorder desired should be raised in this Court, the sentence may date from the date on which it was passed.

Appeal dismissed.

T. R. F. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE MACKINNON AND MR. JUSTICE HAWKE.

1932.
22 *February.*

LEONARD WILLIAM SHORT.

Common Design—Different Felonies.

To convict a co-defendant of more than one crime on the ground of common design, there must be satisfactory evidence that the concert extended to each such crime.

Appeal by leave of the Court against conviction of shooting with intent to murder.

Appellant was convicted at the Central Criminal Court on November 25, 1931, of shooting with intent to murder, and was sentenced by Humphreys, J., to five years' penal servitude. He also pleaded guilty to two charges of pavilion-breaking, and on these he was sentenced to eighteen months' imprisonment with hard labour (concurrent).

Richard Acland, for appellant (under section 10 of the Criminal Appeal Act, 1907), who was present:

The principal facts of the case were not in dispute. On September 24, 1931, appellant and a man named Charles went to Thames Ditton to break into a pavilion. Two police

1932.
22 *February.*

LEONARD WILLIAM SHORT.

Hewart, L.C.J., MacKinnon, J., Hawke, J.

officers, who had been stationed on special duty at the front of the pavilion, heard a noise. When the officers first came in sight of the two men, Charles was standing at a door of the side of the pavilion, and appellant was running towards a gate which led into a lane. Each officer grappled with one man. Appellant managed to break away, went through the gate and started to run down the lane, pursued by the officer. He had run about fifty yards, when shots were fired by Charles at the other officer, which seriously wounded him. The evidence showed that firearms were used by Charles to effect his own escape at a time when appellant had dissociated himself from the common design, if any; but, further than that, there was no evidence of a common design between Charles and appellant to resist arrest by shooting. [He referred to WHITE AND RICHARDSON, R. & R. 99: 1806; *c.q.*]

Eustace Fulton, for the Crown:

There was some slight evidence of such a common design, but I do not think I ought to contend that it was sufficient to entitle the jury to convict appellant of shooting.

THE LORD CHIEF JUSTICE: The question really is, whether there was any evidence fit to go to the jury that the appellant was a party to a common design to effect the felonious purpose, if necessary, by the use of firearms. This Court gave leave to appeal on the possible view that the only common design existing between the appellant and Charles was that of larceny. Counsel for the Crown, with his usual candour, has admitted that there was no satisfactory evidence to justify the jury in convicting the appellant of shooting. The result is that this conviction must be quashed. The sentence of eighteen months' hard labour for pavilion-breaking will remain, but will run from the date on which it was passed.

Conviction quashed.

T. R. F. B.

1932.
22 *February.*

EDWARD ORMESHER.

Hewart, L.C.J., MacKinnon, J., Hawke, J.

EDWARD ORMESHER.

Severity of Sentence.

Appeal against sentence by leave of the Court.

Appellant pleaded guilty to warehousebreaking and larceny at Salford City Sessions on January 4, 1932, and was sentenced by the Recorder to three years' penal servitude.

Appellant was not present, and no counsel appeared for the Crown.

THE LORD CHIEF JUSTICE: If it were not for the fact that four other offences of a similar character were, on the request of the appellant, taken into consideration, we should reduce this sentence even more than we now propose to do, especially as there is a letter from the probation officer of Salford, which is strongly in his favour. The appellant is twenty-eight years of age, and has never been previously convicted. We think that a proper sentence, in the circumstances, is one of twelve months' imprisonment with hard labour, which will run from the date on which sentence was passed.

Sentence reduced.

T. R. F. B.

JOHN PETER REYNOLDS.

1932.
22 *February.*

JOHN PETER REYNOLDS.

Hewart, L.C.J., MacKinnon, J., Hawke, J.

Penal Servitude—Remanet—Concurrent terms.

A sentence of penal servitude to run concurrently with a *remanet* cannot be imposed.

Appeal against sentence.

Appellant pleaded guilty at Blackburn Sessions on January 15, 1932, to shopbreaking and malicious damage, and was sentenced by the Recorder to three years' penal servitude.

Appellant in person.

No counsel appeared for the Crown.

THE LORD CHIEF JUSTICE: The sentence was to run concurrently with a *remanet* of a previous sentence of penal servitude, and was evidently wrong in form. There is a letter from the learned Recorder, who says that if a certain case had been present to his mind, he would have passed a sentence of eighteen months' imprisonment with hard labour. We think that this sentence may properly be reduced to one of twelve months' imprisonment with hard labour, to run from the date of conviction.

Sentence reduced.

T. R. F. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE ACTON AND MR. JUSTICE HAWKE.

ARTHUR JACK KLEIN.

1932.
29 *February.*

Bail—Easter Vacation—Numerous Witnesses and Documents.

The Court grants bail only in exceptional circumstances.

Applicant was convicted after a twelve days' trial at the Central Criminal Court on January 29, 1932, of receiving

1932.
29 *February.*

ARTHUR JACK KLEIN.

Hewart, L.C.J., Acton, J., Hawke, J.

moneys in circumstances which amounted to a misdemeanour and was sentenced by Finlay, J., to twenty-one months' imprisonment in the second division. Klein was on bail before the trial in two securities for £5,000 each and himself in £5,000 (on condition that he reported weekly to the City Police).

Birkett, K.C. (with him *Walter Frampton*) for the appellant, who was not present:

This was a case of great complexity—there were over 700 exhibits and very many witnesses—and Klein's freedom would materially assist in the preparation of the appeal. There are substantial matters to be argued at the appeal. Applicant was a man of good character. There is no reasonable prospect of the appeal being heard before the Easter Vacation. He cited CHARAVANMUTTU, 21 Cr. App. R. 184; 1929 and HARDING, TURNER AND KING, 23 Cr. App. R. 143: 1931. Counsel dealt with certain facts in the case tending to exculpate his client.

The Attorney-General (*Sir Thomas Inskip, K.C.*, with him *L. A. Byrne*), for the Crown, did not accept counsel's view of those facts:

This is a matter for the discretion of the Court. Bail is granted only in exceptional cases.

THE LORD CHIEF JUSTICE, in refusing the application, said that this was not an exceptional case. If a few more days than was usual elapsed between the date of Klein's conviction and the hearing of the appeal, that delay would be due not so much to the very short Easter Vacation as to the voluminous nature of the documents that had to be transcribed.

Application dismissed.

Solicitors for applicant: Messrs. Lloyd & Armstrong.

W. F. B.

HARRY HOLT TURNER.

1932.
29 *February*
—1 *March.*

HARRY HOLT TURNER.

Hewart, L.C.J., Acton, J., Hawke, J.

Term of Sentence—Delay between Conviction and Appeal.

When there has been an unusually long interval between the setting down and the hearing of an appeal the Court may take it into consideration for the purpose of sentence.

Appeal against conviction and sentence.

Appellant was convicted at the Birmingham City Sessions on November 28, 1931, of obtaining money by false pretences and of conspiracy and was sentenced by the Assistant Recorder to eight months' imprisonment in the second division.

Lincoln, for the appellant who was present on bail (*a*).
Arthur Ward, for the Crown.

THE COURT upheld the conviction, but, owing to the delay between the conviction and the hearing of the appeal occasioned by various reasons, including the voluminous nature of the transcript, reduced the sentence to a term of five months in the second division to run from the hearing of the appeal, the days in which the appellant was in custody after conviction before being granted bail being taken into account.

Sentence reduced.

Solicitors for appellant: Messrs. Lincoln & Lincoln.

W. F. B.

(*a*) See p. 143, above.

1932.
1 *March.*

JOHN EDWARD CARR.

JOHN EDWARD CARR.

Hewart, L.C.J., Acton, J., Hawke, J.

Severity of Sentence.

Appeal against sentence.

The appellant, at the Liverpool Assizes on January 29, 1932, pleaded guilty to house-breaking, stealing and receiving and was sentenced by Swift, J., to three years' detention in a Borstal Institution.

Appellant in person.

No counsel appeared for the Crown.

THE COURT, having regard to evidence that the appellant had a good home and a satisfactory family life and had been working for his father, ordered that he be bound over in the sum of £5 for two years and be under the supervision of the Probation Officer. *Sentence reduced.*

W. F. B.

1932.
1 *March.*

MATTHEW McGRATH.

MATTHEW McGRATH.

Hewart, L.C.J., Acton, J., Hawke, J.

Severity of Sentence.

Appeal against sentence.

Appellant at the Middlesex Sessions on February 6, 1932, pleaded guilty to house-breaking and stealing and was sentenced by the Chairman to three years' detention in a Borstal Institution.

Appellant in person.

No counsel appeared for the Crown.

THE COURT, after considering a letter from the appellant's former employer stating that he had found him honest and hard working when in his employment and offering to take him away from his old surroundings and bad company, and to re-engage him, ordered that the appellant be bound over in the sum of £5 and be under the supervision of the Probation Officer on condition that the appellant returned to that employment immediately. *Sentence reduced.*

W. F. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE ACTON AND MR. JUSTICE DU PARCQ.

REGINALD FRANCIS NAYLOR.

1932.
7 *March.*

Defence not Disclosed before Magistrate—Adverse Comments in Summing-up on Prisoner's Silence—Conviction Quashed.

The prisoner, when before the magistrate, on the usual statutory formula concluding with the words: "Do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so," etc., being read out to him at the close of the case for the prosecution, had merely said: "I don't wish to say anything except that I am innocent." The fact that the prisoner had not disclosed his defence on that occasion was adversely commented on in the summing-up at the trial.

Held, the adverse comments on the prisoner's failure to make any further statement on that occasion were improper, and the conviction must be quashed.

WHITEHEAD (21 Cr. App. R. 23; [1929] 1 K. B. 99) applied.

Appeal against conviction.

Appellant was charged at Grimsby Sessions on January 19, 1932, on an indictment containing counts for shop-breaking and larceny, housebreaking and larceny, and receiving stolen goods. The jury returned a general verdict of "Guilty," and the appellant was sentenced by the Recorder to six months' imprisonment with hard labour.

A number of witnesses were called by the Crown, including a man named Matthew Smith, who had been indicted together with the appellant, and had pleaded "Guilty" and been sentenced. There was independent evidence of association between Smith and the appellant. There was evidence that the appellant, at the request of Smith, had taken charge of a case containing some of the stolen pro-

1932.
7 *March.*

REGINALD FRANCIS NAYLOR.

Hewart, L.C.J., Acton, J., du Parcq, J.

perty. The appellant gave evidence denying his guilt; he admitted that he had handled the case, but denied all knowledge of its contents.

Evidence was also given that after the statutory formula concluding with the words: "Do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in writing and may be given in evidence upon your trial" had been read to the appellant at the close of the case for the prosecution before the magistrate, the appellant said: "I don't wish to say anything except that I am innocent." The Recorder, in his summing-up at the trial, commented adversely on the fact that the appellant had not made any further statement on that occasion. The material portions of the summing-up are set out in the judgment.

A. M. Lyons, for the appellant:

There are several complaints with regard to the summing-up. The mere handling of the case by the appellant could not be corroboration of the evidence of Smith, unless it were proved that the appellant knew the incriminating nature of the contents, but the Recorder appears to have treated it as such. There was nothing more than evidence of association between the two men which in no way could be sufficient. The Recorder commented adversely and at some length in his summing-up upon the appellant's attitude at the police court. He was represented by a solicitor and no adverse criticism should have been founded on the fact that he did not there disclose his defence. The very words of the statutory formula are that an accused person is not obliged to say anything unless he desires to do so. In this case the appellant protested his innocence from the first and there is abundant authority for the proposition that in his conduct from first to last there was no corroboration. No foundation exists for the statement in the summing-up

1932.
7 *March.*

REGINALD FRANCIS NAYLOR.

Hewart, L.C.J., Acton, J., du Parcq, J.

" he said nothing." This was a misdirection. [He was stopped.]

P. E. Sandlands, for the Crown:

There was evidence that the appellant was aware of the contents of the case. In HUMPHRIES (1903), 67 J. P. 396, Wills, J., said: " The recent Criminal Evidence Act was passed for the benefit of prisoners, and if the defence was an honest one it should be given at the earliest possible stage, and justices should impress that upon all prisoners; otherwise the value of the defence was much lessened." The matter was carried further in MORAN (1909), 3 Cr. App. R. 25, where the defence of an alibi was set up at the trial, but had not been set up at the police court. The Lord Chief Justice, in giving the judgment of the Court of Criminal Appeal, said: " In this case, when applicant was before the magistrate he said ' I know nothing about it at all. I am sure the constables are wrong. I was away at the time it was done.' Now, if he had gone on to say at the police court that he had been in a certain place, the police would have investigated." The comments complained of were, therefore, such as the Recorder was entitled to make, and, looked at as a whole, the summing-up was a fair one and the case was properly left to the jury.

THE LORD CHIEF JUSTICE: Taking the view we do, we do not think it necessary to deal in detail with the facts of the case. The appellant gave evidence and denied his guilt. The real point is to be found in the criticism which has been made of the summing-up. The appellant was asked, in the usual formula, in the court below whether he had anything to say, and that formula was read out to him. The important words are: " Do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in writing, and may be given in evidence upon your trial," whereupon the accused said: " I don't wish to say

1932.
7 *March.*

REGINALD FRANCIS NAYLOR.

Hewart, L.C.J., Acton, J., du Parcq, J.

anything except that I am innocent." In referring to those words, the Recorder, in his summing-up, continued as follows: " Now you would imagine a purely innocent young man accused of housebreaking and having these words put to him ' Do you wish to say anything? '—Surely if he is an innocent man one would think he would give some explanation of where he was, and what he was doing at the particular time, and would make his defence then and there. But he says nothing." Then the Recorder added: " I can understand the answer to that made by counsel, and I have heard the same answer on many other occasions. It is all blamed on the solicitor. His solicitor was there and advised him to say nothing. Well, the solicitor had to get his client off somehow, and it is very likely his solicitor did advise him to say nothing. But supposing your solicitor did advise you to say nothing when a charge of felony or murder is against you, you would surely say the best thing to do is to say ' I am not guilty ' and explain why." Then follow these remarkable words: " Of course, what lurks in the background of this sort of hanging back, and not disclosing his defence is this, that he gives the prosecution and the police no time to inquire into any statement he may make, so that it might be possible to show that these statements are not true. That is the real reason why many men don't make statements when they are first called upon to do so, why they don't wish to do."

We are of opinion that that was a misdirection. The case is really *a fortiori* upon the case of WHITEHEAD, 21 Cr. App. R. 23; [1929] 1 K. B. 99, where it was held that it is not corroboration of incriminating evidence that the accused did not deny the charge or was silent about it. But it is well to add something further. When one looks at the words of the formula which must be deliberately framed, it is quite obvious that they were intended to convey and do convey to the prisoner the belief that he is not obliged to say anything unless he desires to do so. Now if those

1932.
7 *March.*

REGINALD FRANCIS NAYLOR.

Hewart, L.C.J., Acton, J., du Parcq, J.

words are really to be construed in this sense, that, having heard them, an accused person remains silent at his peril and may find it a strong point against him at his trial that he did not say anything after being told he was not obliged to say anything, one can only think that this form of words is most unfortunate and misleading. We think that these words mean what they say and that an accused person is quite entitled to say: "I do not wish to say anything except that I am innocent." The matter becomes even stronger when one reflects that what was done here was done on the advice of an able and experienced solicitor. It would be strange if a point could properly be made against an accused person if, acting on the advice of his solicitor and following the very words of that which is said to him, he remains silent, that he did not then and there disclose his defence.

Counsel for the Crown has urged everything that can be urged, but we have come to the conclusion that, after this summing-up, this conviction is unsatisfactory and cannot stand. We think that this appeal ought to be allowed and this conviction quashed.

Conviction quashed.

1932.
7 *March.*

GEOFFREY WLADISLAS VAILE POTOCKI DE MONTALK.

GEOFFREY WLADISLAS VAILE POTOCKI DE MONTALK.

Hewart, L.C.J., Acton, J., du Parcq, J.

Obscene Libel—Publication—Test of Obscenity—Defence that Publication was Advantageous for Advancement of Literature.

The offence of uttering and publishing an obscene libel is established as soon as the prosecution has proved the publication and obscenity of the matter charged, and a jury should not be directed that, beyond this, they must find an intent to corrupt public morals.

The test of obscenity is that laid down by Cockburn, C.J., in HICKLIN ((1868), L. R. 3 Q. B. 360, at p. 371): "whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to immoral influences."

Semble, it is a good defence to the charge that the publication of matter *prima facie* obscene was for the public good, as being necessary or advantageous to religion, science, literature or art, provided that the manner and extent of the publication does not exceed what the public good requires.

HICKLIN ((1868), L. R. 3 Q. B. 360) and BARRACLOUGH ([1906] 1 K. B. 210) followed.

Appeal against sentence, and application for leave to appeal against conviction.

Appellant was convicted at the Central Criminal Court before the Recorder on February 8, 1932, of uttering and publishing an obscene libel and was sentenced to six months' imprisonment in the second division.

On January 13, 1932, the appellant and another man interviewed a Mr. de Lozey, the managing director of a firm which produces and sets up type, but does not do any printing. The appellant produced to Mr. Lozey the libel in question, which was a manuscript in six sheets of paper containing compositions in verse. He asked Mr. de Lozey to set it up in type, and said that his publisher was not the sort of man who would print it himself, but that he would allow him the use of his press. Mr. de Lozey said that he must discuss the matter with his partner. The

1932.
7 *March.*

GEOFFREY WLADISLAS VAILE POTOCKI DE MONTALK.

Hewart, L.C.J., Acton, J., du Parcq, J.

appellant left the manuscript and Mr. de Lozey informed the police.

The appellant gave evidence, in which he stated that it was his intention to publish these verses to his own friends "almost all of whom are literary people"; and that he intended to print 100 copies which would have been given mostly to young people of both sexes. He called a witness, who said that there were some obscene words in the compositions, but that there was some literary merit in one of them and that another was a good rendering from Rabelais. The appellant contended that another was a satire on the work of the French poet Verlaine.

The Recorder, in his summing-up, directed the jury as follows: "The test of obscenity is whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall—not what the man intended, but whether the tendency of the publication is to deprave and corrupt not bishops or respectable people who have got clean minds, but people, to use the words of that judgment, whose minds are open to such immoral influences and into whose hands a publication of this sort may fall. . . . That is the first thing. . . . Now the next thing is, was this publication? It is a publication to put it into anybody's hands, and to put this matter into the hands of Mr. de Lozey is a publication in law. If it had not been for Mr. de Lozey's action, it would have got into the hands of some 100 other people. Thirdly, although the matter was obscene and although the matter was published, it would be a defence in this case if the thing was done for the public good, because, although I am not sure that there has been any case upon it, I accept a submission made by one of the most learned of our Judges, Mr. Justice Stephen, in these words: 'A person is justified in exhibiting disgusting objects, in publishing obscene books, papers, writings, prints, pictures, drawings, or other repre-

1932.
7 *March.*

GEOFFREY WLADISLAS VAILE POTOCKI DE MONTALK.

Hewart, L.C.J., Acton, J., du Parcq, J.

sentations, if their exhibition or publication is for the public good, as being necessary or advantageous to religion or science, literature or art, or other objects of general interest; but the justification ceases if the publication is made in such a manner, to such an extent, or under such circumstances, as to exceed what the public good requires in regard to the particular matter published.' . . . Therefore, if you are of opinion (and it is for you to judge, exercising your own good sense) that this can be for the public good as an advancement of literature, in my opinion that would be a defence."

St. John Hutchinson (*C. G. Du Cann* with him), for the appellant;

In order to constitute an obscene libel at common law, there has to be an intention to corrupt public morals: BARRACLOUGH, [1906] 1 K. B. 210, at p. 212. This is made clear, too, by the old form of indictment. There should have been a direction to the jury to this effect. I cannot deny that there was publication in law in this case, though the publication was only of a very limited nature; but something more than publication is essential to constitute the offence, otherwise it would have not been necessary for Cockburn, C.J., to say in HICKLIN ((1868), L. R. 3 Q. B. 360, at p. 371): " The test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall." Inasmuch as the *prima facie* obscenity of these compositions would have been overridden if the jury accepted the view that the publication was advantageous in the interests of literature, the appellant's general literary work ought to have been left to the jury.

L. A. Byrne (*G. P. Jordan* with him), for the Crown: The intention to corrupt public morals is to be inferred

from the act of publication itself; the prosecution need not give affirmative evidence of such intention.

1932.
7 *March.*

GEOFFREY WLADISLAS VAILE POTOCKI DE MONTALK.

Hewart, L.C.J., Acton, J., du Parcq, J.

THE LORD CHIEF JUSTICE: There is no novel question of law here. The law was stated, if I may say so, clearly in BARRACLOUGH, [1906] 1 K. B. 201, where reference was made to the judgment of Cockburn, C.J., in HICKLIN ((1868), L. R. 3 Q. B. 360, at p. 371). There is no doubt that here there was publication; indeed it is not denied that there was. There is no doubt that the material referred to was in the highest, or the lowest, degree obscene. We see no reason at all for interfering with the conviction.

With regard to the sentence of six months' imprisonment in the second division which was passed by a learned Judge of long experience, we have carefully considered the matter and we see no reason for interfering with it.

Appeal dismissed.

Solicitors: Wray, Smith and Halford, for appellant.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE HAWKE.

ARTHUR JACK KLEIN.

1932.
13 *April.*

Indictment—Receiving property "knowing the same to have been . . . obtained . . . under circumstances which amount to . . . misdemeanour"—Conspiracy to defraud specified in indictment—Actual obtaining due to different misdemeanour—Larceny Act, 1916 (6 *& 7 Geo. 5. c.* 50), *s.* 33, *sub-s.* 1.

The appellant was convicted on an indictment which charged him with receiving sums of money knowing them to have been obtained under circumstances amounting to misdemeanour, to wit, conspiracy to defraud, contrary to

1932.
13 *April.*

ARTHUR JACK KLEIN.

Hewart, L.C.J., Avory, J., Hawke, J.

section 33, sub-section 1 of the Larceny Act, 1916. It was contended on his behalf that, as the actual obtaining of the goods by the conspirators had been effected by a different misdemeanour, namely, false pretences, the indictment was bad in law.

Held, as the words of the Act are "obtained . . . under circumstances which amount to . . . misdemeanour" and not "obtained . . . by misdemeanour," the indictment was properly laid and the conviction must be upheld.

KUTAS (1923), 17 Cr. App. R. 179, approved and followed.

Appeal against conviction.

Appellant was convicted at the Central Criminal Court on February 9, 1932, of receiving sums of money knowing them to have been obtained under circumstances amounting to misdemeanour, to wit, conspiracy to defraud, and was sentenced by Finlay, J., to twenty-one months' imprisonment in the second division.

Only one point in the case calls for report, and the facts may be sufficiently summarised as follows: The case for the Crown was that a company called Broad Street Press, Ltd., which was formed in September, 1928, had been used by a band of conspirators for the purpose of defrauding the public by foisting on them worthless shares, and that the appellant had received moneys, with knowledge that they were the fruits of that conspiracy, and had paid them into banking accounts operated by him. The appellant's case was that he had paid the moneys into those accounts in accordance with a practice which he began in January, 1928, and continued without any variation throughout 1928, 1929 and 1930, that he had no knowledge that there was a conspiracy of that nature, and that he had no personal interest in the moneys.

Norman Birkett, K.C. (*Walter Frampton* with him), for the appellant:

The indictment was bad in law, in that it specified conspiracy to defraud as the misdemeanour by which the

1932.
13 *April.*

ARTHUR JACK KLEIN.

Hewart, L.C.J., Avory, J., Hawke, J.

money was obtained, whereas the obtaining was in fact by a different misdemeanour, namely, false pretences. The offence of conspiracy consists in the agreement between the conspirators, though that agreement has to be proved by some overt act, and it was wrong to charge the obtaining of the money as being by the misdemeanour of conspiracy, when it was in fact by the misdemeanour of false pretences made in pursuance of the conspiracy. If the misdemeanour charged is not to be specified with precision in the indictment, there will be infinite trouble ahead. The decision of this Court in KUTAS (*supra*) is against this argument, and Finlay, J., was bound by that decision, but this Court is respectfully asked to dissent from its previous decision in that case.

[THE LORD CHIEF JUSTICE: Are you not reading the words of the statute as if they were "obtained . . . by . . . misdemeanour" instead of "obtained . . . under circumstances which amount to . . . misdemeanour"?]

The Attorney-General (Sir Thomas Inskip, K.C.), Sir Percival Clarke and *L. A. Byrne*, for the Crown, were not called on to argue on this point.

THE LORD CHIEF JUSTICE: Mr. Birkett began by criticising the decision of this Court in KUTAS (*supra*). His argument was that the indictment was bad in law inasmuch as it charged the appellant with having received moneys knowing those moneys to have been obtained in circumstances which amounted to a misdemeanour, namely, conspiracy to defraud. In the opinion of this Court, the criticism of the judgment of the Court in the case of KUTAS (*supra*) fails. [His Lordship read section 33, sub-section 1 of the Larceny Act, 1916 (*a*), and continued:] The words

(*a*) Larceny Act, 1916, s. 33, sub-s. 1: "Every person who receives any property, knowing the same to have been stolen or obtained in any way whatsoever under circumstances which amount to felony or misdemeanour, shall be guilty of an offence of the like degree (whether felony or misdemeanour) . . ."

1932.
13 *April.*

ARTHUR JACK KLEIN.

Hewart, L.C.J., Avory, J., Hawke, J.

of the sub-section, as was pointed out in KUTAS (*supra*) are more comprehensive than the words to be found in the corresponding section of the Larceny Act, 1861. We think that Finlay, J., was right in holding that the argument based on the case of KUTAS failed. [His Lordship then dealt with the other grounds of appeal, and held that they also failed.]

Appeal dismissed.

Solicitors for appellant: Lloyd & Armstrong.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY, AND MR. JUSTICE MACNAGHTEN.

1932.
19 *April.*

MICHAEL MORRISSEY.

Evidence—Prisoner's Character—Questions in Cross-Examination Suggesting other Offences — Summing-up — Jury Told to Disregard Effect—Conviction Quashed—Criminal Evidence Act, 1898 (61 & 62 *Vict. c.* 36), *s.* 1 (*f*).

A prisoner was asked in cross-examination questions tending to show that he had committed other offences. The jury were warned in the summing-up that they ought to disregard the effect of those questions.

Held, the mischief caused by the questions was incurable and the conviction must be quashed.

Appeal against conviction.

Appellant was convicted of housebreaking at Portsmouth Sessions on March 30, 1932, and was sentenced by the Recorder to three years' detention in a Borstal institution.

The indictment contained three counts, charging the

1932.
19 *April.*

MICHAEL MORRISSEY.

Hewart, L.C.J., Avory, J., Macnaghten, J.

accused with two distinct offences of housebreaking on different dates. The later offence was charged, alternatively, in the third count as that of receiving the stolen property. The appellant was first tried on the first count, but the Recorder directed the jury to acquit, as there was no evidence to support that charge. He was then tried on the remaining counts, and evidence was given on behalf of the prosecution that at 8.10 p.m. a man, identified as the appellant, had been seen running from the vicinity of the house broken into and followed to a Roman Catholic church, where at 8.35 p.m. a military policeman found him crouching behind the curtains of a confessional box, on the floor of which the stolen property was subsequently found. The appellant, in his evidence, said that he had gone into the church to wait for a priest named Father Freeley. He was asked the following questions in cross-examination: "*Q.* You know this church very well? *A.* Yes, sir. *Q.* Did you ever break into it? *A.* No, sir. *Q.* Father Freeley has been very kind to you, has not he? *A.* Yes, sir. *Q.* You took something from him one day, did you not? *A.* No, sir. *Q.* You have never pawned anything of his? *A.* No, sir." The Recorder, in his summing-up said: "Do not let your minds be prejudiced against this man by any questions which may have been put to him in cross-examination as to whether he had not broken into this church before and stolen this, that, or the other. Put that matter entirely out of your minds. You have not got to deal with anything of that sort. You have only to deal with the charge brought against him here."

Seymour Collins, for the appellant:

The cross-examination of the appellant suggested that he had committed other offences, and was entirely irregular; the prejudicial effect of it was such that it could not be removed even by the direction in the summing-up to disregard it. [He was stopped.]

1932.
19 *April.*

MICHAEL MORRISSEY.

Hewart, L.C.J., Avory, J., Macnaghten, J.

W. G. H. Cook, for the Crown:

The issue before the jury was whether the appellant was in the church for a lawful purpose; and it is submitted that the cross-examination was admissible as tending to rebut the defence by showing the improbability of the appellant's story. There was ample evidence on which the jury could convict, and even if the cross-examination was irregular the Court is invited to apply the proviso to section 4 of the Criminal Appeal Act, 1907.

THE LORD CHIEF JUSTICE [after stating the facts of the case]: The questions put to the appellant in cross-examination contained the clearest possible suggestions that he had committed other offences. Those questions were in direct contradiction of sub-section (f) of the proviso to section 1 of the Criminal Evidence Act, 1898 (*a*), and none of the conditions which alone would make such questions admissible was fulfilled. It is quite true that the Recorder did his best in the summing-up to persuade the jury to put out of their minds the questions which had been asked, but the mischief had been done and we think it was incurable. We are of opinion, therefore, that this appeal must be allowed and this conviction quashed.

Conviction quashed.

(*a*) Criminal Evidence Act, 1898, s. 1 (f): "A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character unless—(i) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged; or (ii) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution; or (iii) he has given evidence against any other person charged with the same offence."

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE MACNAGHTEN.

ROBERT TREMAYNE.

1932.
2 *May.*

Sentence in Excess of Statutory Maximum—Other Offences taken into Consideration.

Rectification of sentence not warranted in law.

Appeal against sentence.

Appellant pleaded guilty at West Sussex Sessions on March 31, 1932, to obtaining credit by fraud, and was sentenced by the Chairman to twenty-one months' imprisonment with hard labour, twelve other offences being taken into consideration.

Maxwell Turner, for the appellant:

The maximum sentence for the offence of obtaining credit by fraud was twelve months' imprisonment with hard labour. There was no obligation on the Chairman to take the other offences into consideration, but the appellant would suffer great hardship if this Court should now say that they ought not to have been and if the appellant were to become liable to re-arrest after serving his present sentence. Those responsible for the prosecution knew of these other offences for more than two months prior to the trial, and might have indicted the appellant for them.

No counsel appeared for the Crown.

THE LORD CHIEF JUSTICE: This appellant pleaded guilty at West Sussex Sessions to an indictment under section 13 of the Debtors Act, 1869, charging him that he, between October 26 and November 2, 1931, in incurring a debt or

1932.
2 *May.*

ROBERT TREMAYNE.

Hewart, L.C.J., Avory, J., Macnaghten, J.

liability, obtained credit to the extent of £5 10s. 7d. by means of fraud other than false pretences. Twelve other cases were taken into consideration, six of those cases being cases of stealing, and in the result the appellant was sentence to twenty-one months' imprisonment with hard labour. Under the section under which the indictment was framed the maximum penalty was twelve months' imprisonment with hard labour, and the appellant states that he took the course which he did in the belief that that was the maximum sentence. It is quite clear that a slip has been made. It also appears that the appellant has about 269 days to serve as a *remanet* under a previous sentence of penal servitude.

In the circumstances we think the fair course is that the sentence should be a sentence of twelve months' imprisonment with hard labour and that the other twelve cases should be deemed to have been taken into consideration and should not be proceeded with further. In this case, however, although leave to appeal was given, the sentence will not date from conviction.

Sentence reduced.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE MACNAGHTEN.

ALBERT CASEY.

1932.
9 *May.*

Sentence—Quarter Sessions—Sentence not Warranted in Law—Purported Alteration at Subsequent Date—Variation of Record—Validity.

A prisoner was sentenced by a Chairman of Quarter Sessions to three years' penal servitude for attempted larceny. Subsequently the Chairman sought to alter that sentence to one of two years' imprisonment with hard labour, and instructed the clerk of the peace to make the necessary alteration in the record, and the record was altered accordingly. There was no evidence before the Court that the sessions had been adjourned to any specified date. The purported alteration of sentence had taken place in the absence of the prisoner.

Held, it being at least doubtful whether the Chairman had any power to make the purported alteration, the original sentence of three years' penal servitude must be regarded as the sentence actually passed and, as that sentence was not warranted in law, it must be reduced.

Appeal against conviction and sentence.

Appellant was convicted of attempted larceny at Worcestershire Sessions on April 4, 1932, and was sentenced by the Chairman to three years' penal servitude.

After the sentence had been passed the record was drawn up as showing a sentence of three years' penal servitude, and the order addressed to the governor of the prison stated that to be the term of the sentence. A day later, after the Court had risen, the Chairman remembered that a sentence of penal servitude was one not warranted in law for attempted larceny, and, with the approval of a majority of the justices who had been present at the trial, he instructed the clerk of the peace to alter the record by

1932.
9 *May.*

ALBERT CASEY.

Hewart, L.C.J., Avory, J., Macnaghten, J.

striking out the sentence of three years' penal servitude and inserting a sentence of two years' imprisonment with hard labour. The clerk of the peace carried out the instructions so given to him by the Chairman. A fresh order on the basis of the substituted sentence was sent to the governor of the prison, who returned the original order. The certificate of conviction stated that the sentence was one of two years' imprisonment with hard labour.

H. H. Maddocks, for the appellant:

The effective sentence here was one of two years' imprisonment with hard labour. That sentence was passed on the prisoner in his absence, and therefore the conviction is rendered bad in law. HALES, 17 Cr. App. R. 193; [1924] 1 K. B. 602, is directly in point. The sentence is a material part of the trial, and may not be passed in the absence of the prisoner. In HALES (*supra*) the sentence was for felony; in this case the trial was on a charge of felony, though the conviction and sentence were for misdemeanour only. It is submitted that a sentence for misdemeanour cannot be passed in the absence of the prisoner any more than a sentence for felony can. There have been cases where a prisoner on his trial for misdemeanour has been absent during part of the trial, but in all those cases the prisoner was absent at his own request, or the Court was satisfied that there was good reason for his absence.

[THE LORD CHIEF JUSTICE: Are there not cases in which, when the list comes to be made up for the governor of the prison, the Judge who has passed sentence, on further consideration, makes a reduction?]

Such reduction must take place before the record is drawn up. If the sentence which a prisoner has to serve, even though a reduction on the sentence originally passed on him, is passed in his absence, the whole conviction is vitiated. [He referred to *Archbold's Criminal Pleading*

1932.
9 *May.*

ALBERT CASEY.

Hewart, L.C.J., Avory, J., Macnaghten, J.

(28th ed.), p. 242, and LEICESTERSHIRE JUSTICES (1813), 1 M. & S. 442.]

[MACNAGHTEN, J.: Was not the sentence of two years' imprisonment with hard labour a nullity? No sentence could be passed except by the court of quarter sessions. There is no evidence of any adjournment of the Court on April 4 to any subsequent date or of any re-assembly of the Court after April 4, when the prisoner was tried, convicted and sentenced to three years' penal servitude.]

There is a practice in the county of Worcester to adjourn the sessions to a specified date, but there is no evidence before the Court that these sessions were adjourned to any specified date.

[He then dealt with the appeal against sentence on the basis that the sentence in fact passed was one of three years' penal servitude and that that sentence was too severe.]

Christmas Humphreys, for the Crown:

There is authority for the proposition that a prisoner can be sentenced for misdemeanour in his absence: MARY BROWN (1906), 70 J. P. 472. If the usual adjournment to a specified day took place at the end of these sessions, the Court was still in operation when the sentence of two years' imprisonment with hard labour was passed, and that sentence is valid; if, however, there was no adjournment, it cannot be contended that the Court continued in existence.

H. H. Maddocks, in reply:

The provisions of section 11, sub-section 2 of the Criminal Appeal Act, 1907, that "the power of the Court to pass any sentence under this Act may be exercised notwithstanding that the appellant is for any reason not present" show, by inference, that a prisoner, apart from that Act, must be present when sentence is passed on him.

THE LORD CHIEF JUSTICE: We think that there is at

1932.
9 *May.*

ALBERT CASEY.

Hewart, L.C.J., Avory, J., Macnaghten, J.

least considerable doubt whether the Chairman of quarter sessions had power to alter this sentence as he has altered it in the interests of the prisoner, and therefore we treat the matter as being a conviction of attempted larceny with a sentence of three years' penal servitude. That sentence cannot be passed, and therefore the question for the Court under section 4, sub-section 3 of the Criminal Appeal Act, 1907, is What is the appropriate sentence to be passed? [His Lordship reviewed the facts of the case and continued:] This was evidently a carefully considered plan carried out with no little skill and in the opinion of the Court the sentence which the Chairman sought to substitute was quite an appropriate sentence. The sentence, therefore, will be one of two years' imprisonment with hard labour, but, inasmuch as leave to appeal was given, it will run from the date of conviction.

Sentence reduced.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SWIFT AND MR. JUSTICE MAGNAGHTEN.

1932.
6 *June.*

JOHN JAMES QUINN.

Sentence—Supposed Perjury in the Witness-box—Increase by trial Judge.

A sentence of greater severity than the sentence appropriate to a particular offence ought not to be imposed merely because a prisoner has, in the opinion of the trial Judge, committed perjury in the witness-box.

Application for leave to appeal against conviction and sentence.

1932.
6 *June.*

JOHN JAMES QUINN.

Hewart, L.C.J., Swift, J., Macnaghten, J.

Applicant was convicted of shopbreaking and larceny at the County of London Sessions on May 3, 1932, and was sentenced by the Deputy-Chairman to fifteen months' imprisonment with hard labour.

The applicant was not represented and no counsel appeared for the Crown.

The applicant and another man were charged with breaking and entering a shop of Wine Cellars, Ltd., and with stealing 5s. and a quantity of liquor. When the applicant went into the witness-box to give evidence, the Deputy-Chairman said to him: "Now, you have taken an oath to speak the truth; you understand that?" The prisoner: "Yes." The Deputy-Chairman: "Well, I want you to be careful, because if you give evidence on oath which the jury believe is untrue, and you are convicted, your sentence will not be as short as it would have been if you had not given that evidence. You understand that?" The prisoner: "Yes, my lord." The Deputy-Chairman: "Very well. Pay attention to it, and do not forget it." Before sentencing the applicant the Deputy-Chairman said: "I warned you before you went into the witness-box what the consequences would be if you chose to tell a story which the jury disbelieved. You disregarded that warning, and I shall not deal with you as leniently as I otherwise should."

SWIFT, J. [after referring to what had been said by the Deputy-Chairman to the applicant before he gave evidence]: This Court is of opinion that that was an unfortunate way of introducing the applicant's evidence to the jury. A Judge who is trying an accused person has no right to suggest that what that person is going to say is untrue. [The learned Judge referred to the remarks of the Deputy-Chairman before passing sentence, which are set out above, and continued:] Reading those remarks after conviction with the remarks which the Deputy-

1932.
6 *June.*

JOHN JAMES QUINN.

Hewart, L.C.J., Swift, J., Macnaghten, J.

Chairman made before the applicant gave evidence, it is obvious that in the sentence of fifteen months' imprisonment he included something for the offence of saying what was untrue in the witness-box, which he believed the prisoner to have committed. In our view, it is not the function of a Court which has to pass sentence for a particular offence of which a man has been found guilty to add to that sentence some further term of imprisonment for the commission of a supposed offence of perjury with which the prisoner has not been charged and of which there has been no proof and of which the jury has not found him guilty.

This Court is of opinion that the applicant should have leave to appeal against his sentence in order that it may consider what is the proper punishment for the offence of which he has been found guilty without it being encumbered or enlarged by any supposed misconduct on his part while he was in the witness-box. Leave to appeal against conviction is refused.

Leave to appeal against sentence.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SWIFT AND MR. JUSTICE MACNAGHTEN.

1932.
13 *June.*

JOHN JAMES QUINN.

Appeal against sentence (by leave of the Court) (*ante*, p. 196).

G. G. Raphael, for the appellant:

The proper consideration is what is the appropriate

1932.
13 *June.*

JOHN JAMES QUINN.

Hewart, L.C.J., Swift, J., Macnaghten, J.

sentence for the particular offence of which the appellant was found guilty.

Sir Percival Clarke, for the Crown:

The Deputy-Chairman really did no more than make a gesture to discourage perjury.

THE LORD CHIEF JUSTICE [after referring to the statements made by the Deputy Chairman at the trial]: In view of the statements of the Deputy-Chairman it appears to this Court to be clear that some part of this sentence is to be attributed to the fact that, in the view of the Deputy-Chairman, the appellant had given false evidence. If false evidence is given there are appropriate ways of dealing with that offence. In our opinion, it is not correct to increase a sentence on that ground. That is, in effect, to find the prisoner guilty of perjury without a charge and without a trial, and to punish him for that offence. Divesting the case of that matter, we have come to the conclusion that the appropriate sentence is one of nine months' imprisonment with hard labour, and we substitute that sentence for the sentence imposed. As leave to appeal was given the sentence will run from the day on which it was passed.

Sentence reduced.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SWIFT AND MR. JUSTICE MACNAGHTEN.

1932.
13 *June.*

WILLIAM DARGAVIL RANKIN.

Young Offenders—Borstal Treatment.

Explanation of the system of Borstal treatment for young offenders.

Appeal against sentence (by leave of the Court).

Appellant was convicted of housebreaking and larceny at Middlesex Sessions on May 7, 1932, and was sentenced by the Chairman to twelve months' imprisonment in the second division.

Appellant was sixteen years of age and had not been previously convicted. He was charged in two counts with breaking into the same dwelling-house on March 24 and March 31, and stealing 10s. and a key on the first occasion, and eight £1 notes on the second occasion. He was found guilty on both counts, and a further charge of attempting to break and enter the same house on April 7 was taken into consideration.

Appellant in person.

Sir Percival Clarke, for the Crown:

There was no evidence of association with persons of bad character or of general bad conduct until about a fortnight before the appellant's arrest. The period of criminal tendencies is so short that it appears doubtful whether the appellant comes within the provisions of section 1 of the Prevention of Crime Act, 1908 (*a*).

(*a*) Prevention of Crime Act, 1908 (8 Edw. 7, c. 59), s. 1: "(1) Where a person is convicted on indictment of an offence for which he is liable to be sentenced to penal servitude or

1932.
13 *June.*

WILLIAM DARGAVIL RANKIN.

Hewart, L.C.J., Swift, J., Macnaghten, J.

[THE LORD CHIEF JUSTICE: In the words of the statute a distinction is clearly suggested between "habits" and "tendencies."]

Counsel then called Sir Alexander Paterson, one of the Prison Commissioners, who gave evidence to the following effect:

There are no separate prisons in this country set apart for young offenders. The only establishments set apart entirely for young offenders are the five Borstal institutions in different parts of the country. Among these young offenders are distributed after being classified in a boys' prison at Wormwood Scrubs. Classification requires a period varying from one to three months. The more hardened criminals are sent to one institution, and at the opposite end of the scale is another institution, only recently opened, for novices in crime. In that institution the normal period of detention is one year. In all cases, before the offender has served six months of his sentence in a Borstal institution, his case comes up automatically before the visiting committee of that institution, and the boy can be licensed any time after he has served six months, but, except in rare cases, he has to serve a longer period before being licensed.

If a young offender at a Borstal institution misconducts himself he is not sent back to Wormwood Scrubs, but to a special block set aside for the purpose at Wandsworth Prison.

If a boy is sentenced to imprisonment, he goes to an

imprisonment, and it appears to the Court (a) that the person is not less than sixteen nor more than twenty-one years of age; and (b) that, by reason of his criminal habits or tendencies, or association with persons of bad character, it is expedient that he should be subject to detention for such term and under such instruction and discipline as appears most conducive to his reformation and the repression of crime; it shall be lawful for the Court, in lieu of passing a sentence of penal servitude or imprisonment, to pass a sentence of detention under penal discipline in a Borstal institution. . . ."

1932.
13 *June.*

WILLIAM DARGAVIL RANKIN.

Hewart, L.C.J., Swift, J., Macnaghten, J.

ordinary prison, but is kept apart, as far as possible, from the adult prisoners, but it is impossible to guarantee that he never comes into contact with adult prisoners, and for a time he is compelled to come into contact with other young prisoners, some of whom may have been in prison before.

THE LORD CHIEF JUSTICE: The appellant is a boy of sixteen years of age and he has not been previously convicted. We have come to the conclusion that it would be unfortunate to send this boy to prison, and that in his interests and in the public interests it is better to substitute for the sentence of imprisonment a sentence of detention in a Borstal institution for a term not exceeding three years.

Sentence varied.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SWIFT AND MR. JUSTICE MACNAGHTEN.

1932.
21 *June.*

WALTER BERKLEY HART.

Witness for Defence—Suggestion by Prosecution that he should be Discredited—Duty of Counsel to Cross-examine—When Indictment may be Left on File.

If, on a crucial part of the case, the prosecution intend to ask the jury to disbelieve the evidence of a witness called for the defence, counsel for the prosecution ought to cross-examine that witness or, at any rate, to make it plain, while the witness is in the box, that his evidence is not accepted.

An indictment should be allowed to remain on the file only in exceptional circumstances—as, for example, where it appears that the conviction on the first indictment may be quashed on appeal on some technical ground, and the indictment left on the file relates to a similar matter.

1932.
21 *June.*

WALTER BERKLEY HART.

Hewart, L.C.J., Swift, J., Macnaghten, J.

Appeal against conviction and sentence (by leave of the Court).

Appellant was convicted at the Central Criminal Court on May 5, 1932, of committing an assault occasioning actual bodily harm and was sentenced by the Common Serjeant to three years' penal servitude.

On March 16, 1932, the appellant was released from serving a sentence of imprisonment in Wandsworth Prison. On March 18 a serious assault was committed by several persons in Trinity Road, Wandsworth, on a warder in the prison service named Jackson whom, it was alleged, the appellant had threatened a few days previously, before his release. The case for the Crown was that the appellant was one of the assailants, and both Jackson himself and also a civilian named Etches, who went to Jackson's assistance, purported to identify the appellant as having taken part in the assault. At the trial the appellant set up the defence of an *alibi* and called in support of it his wife and four other witnesses. Three of these witnesses were not cross-examined by counsel for the Crown.

S. T. T. James, for the appellant:

The identification of the appellant was unsatisfactory. Leave is asked to call before this Court the prison doctor, to show that owing to the appellant's physical condition he was at the time incapable of running away, as the man who was identified as being the appellant is said to have done. Counsel for the Crown did not cross-examine three of the witnesses called at the trial to support the *alibi*, yet at the end of the case he asked the jury not to accept their evidence. The Judge should have warned the jury on this matter.

[He obtained leave to call the prison doctor, who gave evidence that, when the appellant was in Wandsworth prison, he had a small rupture on his left side. This rupture was still present when he was discharged on March 16. The nature of the rupture was such that it

1932
21 *June.*

WALTER BERKLEY HART.

Hewart, L.C.J., Swift, J., Macnaghten, J.

would not prevent the appellant altogether from running, but might cause him discomfort if he ran.]

Gerald Dodson, for the Crown:

With reference to the *alibi*, the matter was purely a question for the jury. The assault was committed at 4.43 p.m. and the three witnesses called to support the *alibi*, who were not cross-examined, took the evidence only to 4.30 p.m. None of them was called before the magistrate, and one of the witnesses at the trial was the wife of the accused, whose evidence contradicted the evidence already given by the prisoner in the box.

[THE LORD CHIEF JUSTICE: Suppose the jury had believed the witnesses called for the defence, would it still have been possible for the appellant to have committed the assault at the time stated?]

Upon the evidence of Jackson it would still have been possible, though not probable. It is submitted that counsel has a right to remain silent and yet ask the Court or jury to disregard the evidence of a witness.

[THE LORD CHIEF JUSTICE: Is it not elementary that, if counsel is going to suggest that a witness ought not to be believed, he should give that witness the opportunity of dealing with that suggestion?]

Not in every case. Sometimes a witness is palpably untruthful and sometimes a witness is superfluous or immaterial. In such cases counsel, in his discretion, need not cross-examine, but is still entitled to ask the Court, whether composed of a Judge alone or of a Judge and jury, to disregard such evidence.

The summing-up made it abundantly plain that, if the evidence in support of the *alibi* were accepted by the jury, the prosecution must fail.

THE LORD CHIEF JUSTICE: The appellant was charged with one Stubbings at the Central Criminal Court with an assault on a man named Jackson occasioning him actual

1932.
21 *June.*

WALTER BERKLEY HART.

Hewart, L.C.J., Swift, J., Macnaghten, J.

bodily harm. Both pleaded not guilty, and both were found guilty by the jury. The appellant had recently been discharged from serving a sentence of imprisonment at Wandsworth Prison, and while serving that sentence he was brought up before the Governor for some offence. While he was being escorted back to the cells there was a struggle and Jackson, who was a warder in the prison service, came up to help the escort and the appellant was taken back to the cells. There was evidence that the appellant had said to Jackson in the hearing of another man: "I'll do you in for this; I've got a gang outside that will fix you up." At the trial Jackson gave evidence that these threats had been made and that the appellant had been released from prison on March 16. According to the evidence for the Crown, Jackson was in Trinity Road, Wandsworth, on March 18 and saw the appellant. He then crossed the road because he was apprehensive of some danger. Three men, one of whom was Stubbings, then set on him and the appellant joined in. A passer-by came to Jackson's assistance and heard the appellant say: "Do him in"; subsequently a motor car came up and the appellant ran away.

The appellant was arrested on March 19, the day after the alleged assault, and in answer to the charge said: "I have an *alibi*; there are lots of people who can prove where I was." At the trial he gave evidence and his case was an *alibi*—namely, that on the afternoon of March 18 he met his wife at Walham Green station, and went to West Kensington, Hammersmith Broadway and back to West Kensington. He said that a scratch on his face had been caused while he was playing with his baby and that a mark on his lip was due to a blister which had broken. He said, further, that he had a bad rupture and could not have run away as the man who had been mistaken for him was said to have done, and that when in prison he had petitioned for an operation for that rupture. [His Lordship

1932.
21 *June.*

WALTER BERKLEY HART.

Hewart, L.C.J., Swift, J., Macnaghten, J.

referred to the evidence of the prison doctor as set out above and continued:] In support of the *alibi*, various witnesses were called for the defence, including the appellant's wife, and it was the crux of the case to determine first of all whether those witnesses were speaking the truth and if so whether the appellant could possibly have been present and have taken part in the assault. The time was fixed with great precision by Jackson at 4.43 p.m. He said that he had passed the prison clock at 4.40 p.m. and the assault had taken place three minutes later.

A remarkable feature of the case was that three of the witnesses for the defence—Dearing, Bishop and the appellant's wife—were not cross-examined. If the jury accepted their evidence, it appears to be physically impossible that the appellant could have been at the spot in Trinity Road, Wandsworth, at the time of the assault on the warder. In other words, none of the witnesses was given the opportunity of dealing with any objections by the prosecution to their evidence-in-chief. Nevertheless, when the trial approached its close, the jury were invited by the prosecution to disbelieve these witnesses. Without disbelieving them the jury could not have found that the appellant was present at and took part in the assault.

Our attention has been directed to the summing-up, but in no passage did the Common Serjeant mention the fact that these three witnesses were left without being cross-examined. Although it was, undoubtedly, explained to the jury that the defence was an *alibi*, nowhere were they clearly told what the difficulties of the prosecution must be if the evidence of Dearing, Bishop and Mrs. Hart should be accepted. Counsel for the Crown, in the exercise of his discretion, had given these witnesses the "go-by," but the Common Serjeant did not formulate the difficulties arising from the conflict of evidence with regard to time, nor was the fact that the witnesses were not cross-examined mentioned.

1932.
21 *June.*

WALTER BERKLEY HART.

Hewart, L.C.J., Swift, J., Macnaghten, J.

In our opinion, if, on a crucial part of the case, the prosecution intend to ask the jury to disbelieve the evidence of a witness, it is right and proper that that witness should be challenged in the witness-box or, at any rate, that it should be made plain, while the witness is in the box, that his evidence is not accepted. Here no questions were asked in cross-examination. Having regard to that matter, and also to the summing-up, we have come to the conclusion that the conviction was unsatisfactory and cannot stand, and that the appeal ought to be allowed.

It appears from the shorthand note that there is another matter by no means without importance. There is upon the file another indictment against the appellant, and that indictment relates to an offence said to have been committed in February, 1931. Throughout, at any rate, a considerable part of 1931 the appellant was in prison and was not released till March 16, 1932. There may sometimes be a good reason for leaving an indictment on the file, as, for example, where it appears that on some purely technical matter a convicted person may succeed on appeal, and the other indictment relates to a similar matter. Here neither of these conditions appears to be fulfilled; the indictment on the file relates to a matter of eighteen months ago and to a wholly different transaction. It has been said in this Court over and over again that where the prosecution intend to proceed on a further indictment they ought to proceed at once, and not leave the indictment hanging over the head of a convicted man. In our opinion, therefore, there ought to be no proceedings on the indictment relating to the offence alleged to have been committed in February, 1931.

Conviction quashed.

Solicitors for the appellant: Arthur H. Dabbs & Sons.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE TALBOT AND MR. JUSTICE HUMPHREYS.

1932.
11 *July.*

ELLIS CYRIL JONES.

Sentence—Two Years' Hard Labour.

A sentence of three years' penal servitude is now to be regarded as more severe than one of two years' imprisonment with hard labour.

Appeal against sentence.

Appellant pleaded guilty at Middlesex Sessions on May 7, 1932, to shopbreaking and also to possessing housebreaking implements by night and was sentenced by the Chairman to three years' penal servitude.

A police officer gave evidence that the appellant was thirty years of age, and that he had seven previous convictions recorded against him, that he had been in numerous situations since he left school, and in each case his character has been good, and that he had done odd jobs since his last release from prison. The Chairman, in passing sentence, said: "Your case is a very bad one. We were thinking of giving you two years, which is a more severe sentence than we are going to give you—three years' penal servitude."

Appellant in person.

No counsel appeared for the Crown.

THE LORD CHIEF JUSTICE [after referring to the appellant's record and the observations of the Chairman before passing sentence]: It may be that there was once a period

1932.
11 *July*

ELLIS CYRIL JONES.

Hewart, L.C.J., Talbot, J., Humphreys, J.

when a sentence of two years' imprisonment with hard labour was more severe than a sentence of three years' penal servitude. That time has gone by. The remarks made by the Chairman before passing sentence were made under a misapprehension. We think the fair course is to pass the sentence which would have been passed but for that misapprehension, and accordingly we reduce the sentence to one of two years' imprisonment with hard labour. Leave to appeal having been given, that sentence will run from the day on which it was passed.

Sentence reduced.

INDEX.

AGE,
belief about, 25, 63

ATTEMPT
to be distinguished from full offence, 12

AUTREFOIS ACQUIT OR CONVICT, 1

BAIL,
estreat of recognisances, 82
granted, 66, 68, 143
refused, 173

BANKRUPT,
obtaining credit by, 163

BORSTAL,
appellant not suitable for, 55, 61, 73, 104
explanation of system, 200

CAUTION,
effect of not administering, 156
evidence as to administration, 62

CHARACTER OF PRISONER
elicited by prisoner's counsel, 39
question on industrial school, 74
questions suggesting other offences, 188

COMMON DESIGN, 170

CONSPIRACY,
conviction of one of two co-defendants quashed, 53
receiving property obtained under circumstances amounting to, 185

CONVICTIONS QUASHED, 8, 18, 21, 22, 25, 32, 36, 39, 44, 53, 56, 59, 70, 77, 79, 101, 105, 112, 132, 135, 145, 153, 156, 163, 170, 177, 188, 202

CORROBORATION
derived from prisoner's own evidence, 116
in sexual offences, 25

CROSS-EXAMINATION,
improper questions, 145
necessary where witness sought to be discredited, 202
on character of prisoner, 74, 188

DEFENCE
not disclosed before magistrate, 177

EVIDENCE,
prosecution must disclose all relevant, 39

FALSE PRETENCES,
defective indictment, 21
intent to defraud, 132
system, 77

FRAUDULENT CONVERSION,
direction on, 18

HABITUAL CRIMINAL,
conviction quashed, 22
convictions in Scotland, 166
evidence of offences outside statutory notice, 128
misdirection on attempt to get work, 22
sentence of preventive detention quashed, 125

INDICTMENT,
defective, 21
when to be left on file, 202

LEGAL AID,
desirability of granting, 16, 56, 79

LETTER DEMANDING WITH MENACES, 1

NOTICE OF APPEAL,
withdrawal of abandonment, 150

OBSCENE LIBEL, 182

OUTSTANDING OFFENCES,
consent before taking into consideration, 153
taken into consideration on reduction of sentence, 191

PERJURY IN WITNESS-BOX,
increase of sentence for supposed, 196, 198

PLEA OF GUILTY,
conviction reviewed, 153

PLEA OF NOT GUILTY,
withdrawal during trial, 16

PROSPECTUS,
falsity of, 83

PUBLIC PLACE,
meaning of, 49

RAPE,
desirability of defence by counsel, 16

RECEIVING,
property obtained under circumstances amounting to misdemeanour, 185

REGISTRATION OF BUSINESS NAMES,
title of military officer, 128

REMANET. *See* SENTENCE.

ROAD TRAFFIC ACT,
meaning of "public place," 49

SENTENCE,
departure from ordinary rule as to dating, 116, 166, 191
increase for supposed perjury, 196, 198
not warranted in law, 191, 193
purported alteration after conclusion of sessions, 193
reductions of, 7, 10, 11, 12, 15, 28, 30, 31, 38, 45, 46, 47, 48, 51, 52, 55, 61, 69, 76, 77, 103, 104, 125, 127, 130, 142, 153, 158, 160, 161, 162, 172, 173, 175, 176, 191, 193, 198, 208
remanet, 173
two years' hard labour, 208
varied, 73, 200

STATEMENT BY ACCUSED
after caution, 62
in answer to interrogation by police, 56

SUMMING-UP,
admissions by accused, 70
adverse comments on prisoner's silence, 177
alibi, 112
cases of co-defendants to be distinguished, 105, 135
corroboration in sexual cases, 25
fraudulent conversion, 18
habitual criminal, 22
intent to defraud, 132
irregular cross-examination, 188

THREAT TO PUBLISH
with intent to extort money, 1

"TWENTY-THREE YEARS OF AGE OR UNDER," 63

VERDICT,
ambiguity, 138
necessary when prisoner given in charge, 16
rider to, 119, 138
substituted, 12

WITNESS,
duty to cross-examine, 202

Photographed from the only available copy of the original edition and reprinted by Photo Lithography in Great Britain at The Haycock Press Ltd., London

BIBL. LONDIN. UNIV.